No. 74-887

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW CROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS, COMMITTEE FOR AN EFFECTIVE CITY COUNCIL,

Petitioners,

vs.

CITY COUNCIL OF THE CITY OF CHICAGO, RICHARD J. DALEY, individually and as Mayor of the City of Chicago, and BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL L. SHAKMAN
R. DICKEY HAMILTON
208 South LaSalle Street
Chicago, Illinois 60604

ABAM A. HARTUNIAN
ROBERT PLOTKIN
33 North Dearborn Street
Chicago, Illinois 60602

ROBERT L. TUCKER
11 South LaSalle Street
Chicago, Illinois 60603

HOWARD C. EGLIT
6 South Clark Street
Chicago, Illinois 60603
Attorneys for Petitioners

The Scheffer Press, Inc.—(312) 263-6850

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on

September 9, 1974, a petition for rehearing having been denied by said court on October 21, 1974.

CITATIONS TO OPINIONS BELOW

This case has been twice tried and twice appealed. The opinion at the first trial is reported at 322 F. Supp. 428 (N.D. Ill. 1971). That decision was reversed and remanded for a new trial by an opinion of the United States Court of Appeals for the Seventh Circuit reported at 466 F. 2d 830 (1972), *cert. den.* 409 U.S. 893. The result of the second trial is reported at 361 F.Supp. 530. (Appendix B hereto) An appeal was taken therefrom and this Petition for a Writ of Certiorari is directed to the second decision of the court of appeals, reported at 503 F.2d 912 (1974) (Appendix A hereto).[1]

JURISDICTION

The judgment of the United States Court of Appeals was entered on September 9, 1974. (App. A) Rehearing was denied on October 21, 1974. (App. C) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

The following questions are presented:

1. Whether the trial and appellate courts erred in failing to grant relief after each court found that certain wards of the City of Chicago had been drawn so as to *purposefully* exclude Blacks and Puerto Ricans.

2. Whether, after finding that Blacks and Puerto Ricans had been *purposefully* excluded, the trial and ap-

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[1] Citation to appendices to this petition are made as follows: "App. A [B, etc.] —," indicating the page on which the cited material is found.

pellate courts erred in refusing to apply the "strict scrutiny" test to the City's action so as to shift to the City the burden of justifying the exclusions.

3. Whether the court of appeals erred in reversing the trial court's finding that one other ward had been racially gerrymandered.[2]

STATEMENT OF THE CASE

Petitioners, plaintiffs below, commenced this action in December, 1970 to remedy racial and ethnic gerrymandering in the 1970 reapportionment of the wards of the City of Chicago. Until 1980 that reapportionment will govern the election of aldermen to the Chicago City Council, the City's governing legislative body. Federal jurisdiction is based upon 28 U.S.C. Section 1343, since the action arises under the 14th and 15th Amendments and the Civil Rights Act. (42 U.S.C. Sections 1971 *et seq.*) (Relevant statutory and constitutional provisions are set forth in Appendix D hereto.)

After a trial lasting approximately three weeks, the trial court rejected all claims of gerrymandering. *Cousins* v. *City Council of the City of Chicago,* 322 F.Supp. 428 (N.D. Ill. 1971). The court of appeals reversed and remanded, holding the trial court's findings on that issue to be clearly erroneous. *Cousins* v. *City Council of City*

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[2] Subsumed in these questions are the closely related questions of whether the evidence required application of the "strict scrutiny" test and whether the evidence required the entry of the relief sought in the trial court.

of Chicago, 466 F.2d 830 (7th Cir. 1972), *cert. den.* 409 U.S. 893.

The court of appeals, in its first opinion, noted that the City's reapportionment plan had been based upon a reapportionment map drawn in secret by Thomas Keane, the alderman in charge of the City Council's reapportionment subcommittee. (466 F.2d at 835) The court of appeals also found that Keane had concealed the existence of that map (the "Secret Map") from the district court. (466 F.2d at 835-36) And the court found that conversations during the drawing of the Secret Map suggested that reapportionment decisions had been based upon racial and ethnic considerations. (466 F.2d at 838)

At retrial the district court found that one ward, the 7th, had been racially gerrymandered, and ordered it redrawn. (361 F.Supp. at 534-35; App. B8-9) It also held that three other wards had been drawn *purposefully* to exclude Blacks (Wards 14 and 16) and Puerto Ricans (Ward 31) (See App. B5-6)[3] The district court denied relief with respect to those wards on the ground that since the ultimate purpose of the gerrymander was to preserve incumbent White aldermen, it could not be said that an anti-Black or anti-Puerto Rican *animus* predominated. (364 F. Supp. at 533-34; App. B5-6.) The district court therefore concluded that the exclusion of Blacks and

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[3] After releasing the Decision and Order set out in Appendix B the district judge made the following additional statement about the gerrymandering of wards 14 and 16:

> "Now what, it seems to me, happened was they districted in such a way that these two aldermen, Burke and Sheridan, would not be in black wards." (See plaintiffs-appellants' appendix in the court of appeals, p. 368. That appendix has been transmitted to this court with this petition for certiorari.)

REASONS FOR GRANTING THE WRIT

Petitioners respectfully urge the Court to grant the writ for the following reasons:

First, this case presents previously undecided questions of central importance to the vindication of 14th and 15th Amendment rights in racial gerrymandering cases. As Judge Stevens said in his concurring opinion:

> ". . . the issues presented by this case are of unique importance and arise in an area of the law which is largely undeveloped . . ." (503 F.2d at 925; App. A 25)

Those issues include: (1) Whether the plaintiffs in a racial gerrymandering case must not only prove that they were purposefully excluded in the reapportionment of particular legislative districts, but must *also* prove some sort of material "damage" or "impairment" of their voting strength—the difficult burden of proving what would have occurred had there been no discrimination. (2) This case also presents the separate question of whether the "strict scrutiny" test applied by this Court in cases involving fundamental constitutional rights (see pp. 13-15 *infra*) applies to racial gerrymandering and requires the governmental defendant to justify its action in excluding Blacks and Puerto Ricans from the legislative districts involved.

Second, review should be granted because the court of appeals and the district court resolved the foregoing legal issues erroneously. This Court's prior decisions in other cases involving racial classifications strongly hold that once the plaintiff has shown that racial factors played a role in a governmental decision, the burden shifts to the governmental body to show that it acted properly

and in pursuit of a lawful and compelling state interest. This Court's voting-rights decisions are to the same effect. There is no rational basis for a different rule in reapportionment cases. None of this Court's prior reapportionment decisions address this issue. (See pp. 10-13 *infra*).

Third, the rule adopted by the lower courts effectively means that few if any victims of racial gerrymandering will ever be able to prove their case. It means the victim must do more than carry the difficult burden of proving acts of intentional discrimination. In addition, he must prove some undefined quantum of damage or impairment of the voting power of the group against which the discrimination was directed.

In support of these reasons for granting the writ, the balance of this petition makes these three points: (1) This Court is presented with reliable findings of fact that Blacks and Puerto Ricans were purposefully excluded in the drawing of certain wards. (2) This Court's prior decisions dealing with gerrymandering do not resolve the legal issues presented here. (3) The whole thrust of this Court's decisions in cases dealing with voting rights and racial classifications is contrary to the rulings of the lower courts in this case.

1. THE LOWER COURTS CORRECTLY FOUND THAT BLACKS AND PUERTO RICANS HAD BEEN PURPOSEFULLY EXCLUDED IN THE DRAWING OF CERTAIN WARD BOUNDARIES, BUT ERRONEOUSLY DENIED RELIEF.

In evaluating the crippling effect of the court of appeals' decision upon future efforts to prove racial or ethnic gerrymandering, it is important to note the unprecedented, direct evidence that the plaintiffs pre-

sented in this case (which the trial court and the court of appeals accepted as true). That evidence consisted, among other things, of the testimony of three disinterested student interns that they had been present when Alderman Thomas Keane, the draftsman of the redistricting plan, made explicitly racial decisions.[4]

The court of appeals' opinion did not take issue with those factual conclusions. Rather, the court made the following statements about what had been proven at trial:

With respect to drawing wards 14 and 16:

> "Properly, . . . the district judge found that Alderman Keane made racially explicit statements to Bell [his assistant] and the students [the intern-witnesses]; that pursuant to Keane's instructions the Bell-student map [the Secret Map] was revised so as to place the residences of white alderman Sheridan and Burke in white majority wards; *and that the motivation for these changes was to ensure the re-election of these two 'bright young men' by providing them with substantially white electorates.*" (503 F.2d at 919-20; App. A14; footnotes omitted.) (Emphasis added)

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[4] This testimony is summarized in the court of appeals' first opinion remanding this case for a retrial, 466 F.2d 830 (7th Cir. 1972), *cert. denied*, 409 U.S. 893 (at 466 F.2d 838-840) and in the September 9, 1974 opinion at 503 F.2d 918-21; App. A14-17.

In addition, at the retrial petitioners also produced uncontroverted expert testimony that in the 1970 ward map there was a statistically-demonstrable purpose to reduce the voting strength of Blacks and Puerto Ricans. This evidence, which was not discussed in the opinions below, is described in detail at pages 37-40 of petitioners' initial brief in the court of appeals. A copy of that brief has been included in the record transmitted to this Court with this petition.

With respect to ward 31:

> "There is ample support in the record for the district court's finding that *in accord with Alderman Keane's wishes, Bell, in drawing the final Bell-student map, extended the 31st ward as far west as possible in order to avoid the inclusion of additional Puerto* [illegible] boundaries on the Bell-student map [the Secret Map] and on the 1970 map are very similar." (503 F.2d at 921; A17) (Emphasis added)

In both instances, the court of appeals nonetheless affirmed a denial of relief. In the case of the 14th and 16th wards the court stated that the evidence had not shown that the action produced "a smaller number of black majority wards than existed before the revision." (503 F.2d at 920; App. A14) In the case of the 31st ward, the court concluded that the trial court was warranted in denying relief because "the failure to include the Puerto Rican regions in the 31st ward caused no discernible loss of Puerto Rican voting strength." (503 F.2d at 921; App. A17)

It should be noted that the court of appeals held that had the Puerto Rican areas in question not been deleted from the 31st ward, that ward's Puerto Rican population would have been 32% instead of 25%. (See 503 F.2d at 921; App. A17). *Accordingly, the court of appeals ruled that purposefully excluding 7% of a ward's population (in this case approximately 4600 Puerto Rican persons in a ward of 66,000) is not unlawful gerrymandering.*

Finally, the court of appeals reversed as "clearly erroneous" the trial court's decision that the 7th ward had been racially gerrymandered to keep it majority-White. In so ruling, it noted that while there was evidence in the record "consistent with a purpose of minimizing black voting strength in the 7th ward" (503 F.2d

at 919; App. A12-13), and "consistent with an inference that some of the changes [in the 7th ward boundaries] . . . were racially motivated, there were also legitimate explanations for some of them in terms of compactness, and, in any event, a relatively small reduction (2.5%) in the size of the approximately 30% black minority is insignificant as related to the issues here." (App. A13)

2. THIS COURT'S PRIOR DECISIONS DEALING WITH GERRYMANDERING DO NOT RESOLVE THE ISSUES PRESENTED HERE.

Petitioners argued to the district court and court of appeals that once petitioners had proven the intentional exclusion of Blacks and Puerto Ricans from the wards in question, the City of Chicago was required by the "strict scrutiny" doctrine to justify that exclusion. In erroneously rejecting the argument that a justification was required, the court of appeals correctly noted that there are no decisions of this Court "involving either multi-member or single-member districting in which the 'strict scrutiny' analysis, as defined in *San Antonio* [*School District* v. *Rodriguez,* 411 U.S. 1 (1973)], has been applied." (503 F.2d at 923; App. A20) The court of appeals therefore concluded that the "strict scrutiny" analysis should not apply.

The simple fact is that this Court's prior gerrymandering decisions do not resolve, or even squarely consider, the question.

The leading case is *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960). But since *Gomillion* was a case in which the trial court dismissed a complaint on its face, in reviewing that dismissal all of the plaintiffs' allegations were assumed to be true. This Court had no occasion to consider how much proof the plaintiff must produce or

when the burden of justifying discriminatory action shifted to the government.

In *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), this Court simply accepted the findings of a majority of a three-judge district court that the plaintiffs had "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines." (376 U.S. at 56) *Wright* is clearly distinguishable from the present case because here the trial court found, and the court of appeals accepted as true, that "racial considerations" motivated the location of certain ward boundaries and such boundaries were drawn "on racial lines". All that *Wright* holds is that where there are conflicting factual inferences as to whether boundaries have been drawn on a racial basis, the fact-finder may choose which inference to accept.[5]

Kilgarlin v. *Hill*, 386 U.S. 120 (1967), was a *per curiam* affirmance of a three-judge court's decision that the plaintiffs had not proved their allegations of racial gerrymandering. The three-judge district court had found that there was not "a scintilla of probative evidence to substantiate plaintiffs' charges of racial gerrymandering." *Kilgarlin* v. *Martin*, 252 F.Supp. 404, 435 (S.D. Tex. 1966). This Court's affirmance of the three-judge court's conclusion was one sentence in length. Its brevity reflected the fact that this Court was not called upon, on the record presented to it, to discuss the issue of what constituted a *prima facie* case or when the burden of

[5] If *Wright* is relevant at all, it teaches that the court of appeals erred in this case in rejecting the trial court's finding that the 7th Ward was racially gerrymandered. The court of appeals noted that "there was evidence consistent with an inference that some of the changes made by the subcommittee [in drawing the 7th Ward] were racially motivated . . ." (503 F.2d at 919; App A13) Nonetheless, the court of appeals rejected those inferences and found no racial gerrymander.

justification shifted to the defendant. (See 386 U.S. at 121)

In *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), the question was whether the mere inclusion of a predominantly Black ghetto area in a large multi-member legislative district unconstitutionally discriminated against ghetto residents. The Court concluded, much as in *Wright*, that there was no basis for finding an effort to discriminate against Blacks:

> ". . . the failure of the ghetto to have Legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes." (403 U.S. at 153)

Indeed, the Court acknowledged that there was "no suggestion" that the districts in question "were conceived or operated as *purposeful* devices to further racial or economic discrimination." (403 U.S. at 149) (emphasis added.) Once again, this Court was not presented with even a *prima facie* showing of racial discrimination. Accordingly, as in *Wright*, this Court was not called upon to consider whether a "strict scrutiny" approach would apply if a *prima facie* case were made out.

Finally, in *White* v. *Regester*, 412 U.S. 755 (1973), this Court affirmed a trial court decision that multi-member districts in Dallas and Bexar County, Texas must be redrawn because they were racially discriminatory. (412 U.S. 765-69) Although in *White* the Court did not have to consider the strict scrutiny test, it used language which tends to support petitioners' view of what constitutes a *prima facie* case of racial gerrymandering:

> "The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—*that its mem-*

> *bers had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.*" (412 U.S. at 766) (Emphasis added)

Applying that standard to the present case, it is clear that here the court of appeals and the trial court erred. For it is surely true that the Blacks and Puerto Ricans excluded from wards 7, 14, 16 and 31 "had less opportunity than did other residents in the district to participate in the political processes . . ."

In short, this Court has not previously been required to determine, in a racial gerrymandering case, whether the strict scrutiny test applies or how much proof the plaintiff must present before the buden of justification shifts to the state. The only suggestion of an answer is found in *White* v. *Regester, supra*—and it strongly supports petitioners' position here.

3. THE WHOLE THRUST OF THIS COURT'S DECISIONS IN OTHER CASES INVOLVING VOTING RIGHTS AND RACIAL CLASSIFICATIONS IS CONTRARY TO THE RULINGS OF THE LOWER COURTS IN THIS CASE.

Apart from cases involving gerrymandering, there are two principal lines of decision in this Court that strongly support petitioners' position and are contrary to the rulings of the court of appeals and the trial court. One such line of cases involves voting rights. The other involves racial classifications. In both situations this Court has applied the "strict scrutiny" analysis.

Dunn v. *Blumstein*, 405 U.S. 330 (1972), states the rules applicable to voting-rights cases. In *Dunn* this Court struck down a Tennessee residency requirement:

> "In sum, durational residence laws must be measured by a strict equal protection test: they are uncon-

> stitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.'" (405 U.S. at 342) (Court's emphasis.)

The Court went on to quote language from *Carrington* v. *Rash*, 380 U.S. 89, 94 (1965), that is applicable here:

> "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." (Quoted in *Dunn* at 405 U.S. 355)

Dunn establishes that devices which impair voting rights require strict scrutiny by the courts. Once a *prima facie* case has been proven, the defendant must show that its action was "necessary to promote a compelling governmental interest." In the present case the plaintiffs proved, and the lower courts found, a "fencing out" of Blacks and Puerto Ricans from certain election districts. Such findings should have triggered application of the compelling state interest test articulated in *Dunn* and the other cases upon which it is based.

The second relevant line of cases applying the strict scrutiny test involves racial classifications. In such cases proof that government has made a racial classification strips away the usual presumptions of constitutionality to which legislative actions are normally entitled. As Justice Stewart stated in his concurring opinion in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 61 (1973):

> "Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently 'suspect.' Because of the historic purpose of the Fourteenth Amendment, *the*

> *prime example of such a 'suspect' classification is one that is based upon race.* [Citing cases]" (Emphasis added.)

Applying these principles, this Court has frequently shifted to the government the burden of justifying its actions once the plaintiffs have proven that a racial classification was made. Thus, in *Turner* v. *Fouche*, 396 U.S. 346, 359-61 (1970), and *Jones* v. *Georgia*, 389 U.S. 24, 25 (1967), the Court shifted to the government the burden of disproving discrimination once historical or statistical proof of unequal treatment of Black persons in jury selection had been presented.

This Court recently applied the same analysis in a school desegregation case, *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973). The district court had found intentional segregation in one part of the Denver school district, but held that the plaintiffs had not proven discrimination in other parts of the same district. The Supreme Court reversed the latter finding and shifted the burden of proving the absence of segregative intent to the school board:

> "In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. *Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions.*" (413 U.S. at 210) (Emphasis added)

There is no basis for refusing to apply to the present case the burden-shifting principles of *Keyes* and other decisions of this Court in cases involving racial classifications.

CONCLUSION

Typically, legislators who have practiced racial or ethnic gerrymandering do not freely announce that fact. Direct evidence of such gerrymandering is rare. The facts of *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), in which a city simply changed its boundaries to exclude virtually all its Black residents, are not likely to be soon repeated.

Instead, racially and ethnically discriminatory gerrymandering by sophisticated urban politicians will, as this case illustrates, involve secretly-conceived changes in election district boundaries, the exact scope and consequences of which are never ascertainable.

Yet in precisely such cases the rules announced in this case by the lower courts will prevent redress of such gerrymandering. First, it will always be possible for a clever gerrymanderer to claim that he was motivated by "compactness" or "historical neighborhood boundaries" or other "permissible" factors — even when, as here, there is direct evidence that racial and ethnic factors motivated his decisions. Second, under the lower court's approach the plaintiff must go still further and somehow establish that, but for the choices made in redistricting, Puerto Ricans would have had "discernibly" more voting strength or the area in question would have contained a larger "number of black majority wards than existed before the revision."

Rather, the same rule should apply as in other voting-rights and racial classification litigation: once the plaintiff introduces proof that racial or ethnic origin was taken into account the defendant must prove that discrimination did not result. Unless such a rule is applied

redress will be foreclosed because it will never be possible for the plaintiff to carry the double burden of proving that permissible factors do not account for particular boundaries and of showing the scope and consequences of the discrimination that was practiced.

The most that a plaintiff is likely ever to be able to prove is what the petitioners did prove in this case: (1) that Blacks and Puerto Ricans were *purposefully* excluded from certain wards, and (2) that when petitioners prepared one sample unbiased reapportionment map of Chicago (which was all that petitioners had the resources to prepare), it resulted in at least one, and probably two, more majority-Black wards than the City's official map.[6]

To require more than that is to impose upon plaintiffs the impossible task of proving what would have been. Rather, the only fair result — and the only result consistent with vindicating the constitutional rights involved — requires that when plaintiffs have proven that the government intentionally excluded racial or ethnic groups

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[6] See plaintiffs-appellants' initial brief in the court of appeals, pp. 8-10, where it is pointed out that: (1) The single sample map that the petitioners produced resulted in an additional majority-Black ward and (unlike the 1970 map) a second ward that was over 45% Black and could be expected quickly to become majority-Black. (2) In the City's map there is extremely unequal treatment of Blacks in "border areas" (i.e., areas of the City of Chicago containing racial dividing lines that could equally readily have resulted in wards that were either majority-White or majority-Black). By contrast, the treatment of Blacks and Whites in such border areas is the same in the petitioners' sample map. These two very substantial differences between the two maps were never explained upon any basis but race — either in the trial court's or the court of appeals' opinions.

in drawing legislative boundaries, the defendants must prove that there was a compelling governmental interest justifying such action.

This Court should grant the writ and bring the law in this important area into conformity with its other decisions.

Respectfully submitted,

MICHAEL L. SHAKMAN
R. DICKEY HAMILTON
208 South LaSalle Street
Chicago, Illinois 60604

ARAM A. HARTUNIAN
ROBERT PLOTKIN
33 North Dearborn Street
Chicago, Illinois 60602

ROBERT L. TUCKER
11 South LaSalle Street
Chicago, Illinois 60603

HOWARD C. EGLIT
6 South Clark Street
Chicago, Illinois 60603
Attorneys for Petitioners

Dated: January 17, 1975

except the 7th are the product of purposeful or invidious racial or ethnic discrimination. The court found that defendants intended to change what they believed was a black majority in the 1961 7th ward into an overwhelmingly white majority. To correct the 7th ward situation, the court deemed it sufficient to redraw the boundary between the 7th and 8th wards so that each had a majority of black residents of approximately 52%, and ordered a special election November 27, 1973 in the modified 7th ward. Taxable costs were awarded to plaintiffs, but all other relief sought by them was denied. The special election was held and the person elected is serving.

Plaintiffs appealed from the judgment, except for specified portions including those with respect to the 7th and 8th wards, and they appealed from a supplemental order denying them attorney's fees. Defendants cross appealed from described portions of the judgment, including those affecting the 7th and 8th wards.

At the second trial much of the evidence from the first trial was reintroduced. The most important additions were the second deposition of Alderman Keane and a sample ward map, offered by plaintiffs and referred to as the Singer map. Mr. Rubin Singer prepared this map using the figures available when the subcommittee had drawn the 1970 map, achieving equality of population within the same narrow limits as the subcommittee, maintaining contiguity, and making the wards as compact, i.e., as nearly square, as possible. He did not take into account the location of black or Spanish-language people.

In our earlier opinion, we stated that although no minority racial or ethnic group is entitled to have any particular voting strength reflected in the city council, "such strength must not be purposefully mnimized on account of . . . race or ethnic origin." 466 F.2d at 843. The district court was satisfied that, except for the 7th ward, the proof did not establish purposeful minimization. In examining whether its findings were clearly erroneous (mindful of our duty of specially close scrutiny, 466 F.2d

at 837), we shall first consider the overall result of 15 black majority wards in the 1970 map, and any evidence that this number instead of a greater one was the result of a purpose to minimize black voting strength. We shall then examine the evidence with respect to the choice of ward lines in particular regions pointed out by plaintiffs and considered by the district court. Finally we will focus on the ward boundaries claimed to be gerrymandered to the detriment of Puerto Ricans and the Spanish-language group.

I. *The possibility of drawing the inference of purposeful minimization from the overall result.*

In our earlier opinion, we indicated that plaintiffs had fallen short of producing sufficient persuasive circumstantial proof that the ward boundaries were the result of purposeful discrimination.[1] We suggested that a demonstration that one or more maps could be drawn, "following an objecive standard, rationally related to redistricting and indifferent to race" producing greater voting strength for minority groups, would be persuasive. 466 F.2d at 843. The only map introduced pursuant to this suggestion was the Singer map. Defendants note that the mapmaker is a "partisan,"[2] but do not otherwise make any claim that the map is not objective or that it is defective.

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[1] Purposeful minimization of the voting strength of a minority racial or ethnic group is the sort of conduct proof of which is unlikely to be direct or specific. A finding that the challenged districting reflects such discrimination must usually rest on inferences from circumstances. One approach, where such a claim is made is to compare the number of black majority wards in the challenged map with another map which might equally reasonably be drawn, but with more such wards, and assess whether the difference is more probably explained by a purpose to discriminate than by legitimate considerations.

[2] Singer was a member of the Board of Directors of plaintiff Independent Voters of Illinois at the time this action was instituted.

In their arguments before the district court to remand and before us, the parties utilized the Singer map primarily to aid in their analysis of particular regions. At this point, we shall inquire whether the 1970 districting map, when evaluated in comparison with a racially neutral districting plan shows such difference at to be itself a basis (or perhaps one basis in conjunction with others) for inferring a purposeful minimization of the voting strength of the racial minority.

A table is set out in the margin comparing the number of wards created by the Singer map and the 1970 map with given percentages of black population.[3] At the outset we note as argued by plaintiffs that the Singer map created 16 black majority wards (out of a total of 50 wards) while the 1970 map[4] produces only 15 black majority

[3] The figures on racial breakdowns were supplied by the Census Bureau subsequent to the drafting of the 1970 ordinance. The figures in brackets represent the number of wards in each category after the change ordered by the district court below.

Percent black population.	Number of wards created with such percentage.	
	Singer map	1970 map
0 - 15%	27	28
15 - 25	1	1
25 - 35	3	3 [2]
35 - 45	2	3
45 - 50	1	0
50 - 55	2	0 [2]
55 - 65	2	1
65 - 75	1	1
75 - 85	1	2 [2]
85 - 100	10	11
	50	50 [50]

[4] The comparisons are made with the 1970 map as enacted, and not as changed by the district court.

wards. Looking further, and assuming that there is probably enough political strength in a 35% minority to be significant for our present purpose, we have compared the number of wards with 35% or more black population under the 1970 map and the Singer map. There are 19 such wards under the Singer map and 18 under the 1970 map.

The record contains considerable evidence that Alderman Keane was aware of the racial compositions of various areas of the city, and that the choices of some particular ward lines were motivated by that consideration.[5] It is difficult to say that the differences between the number of wards with certain percentages of black residents in the 1970 map and in the Singer map are sufficient to be highly persuasive that there was purposeful minimization of black voting strength in the 1970 map, and even in the light of the evidence of awareness of race and consideration thereof by Keane, it is our judgment that the finding of the district court is not clearly erroneous.

II. *Evidence as to specific boundaries.*

On remand, the parties and trial court focused on the extent to which racial considerations might have affected ward boundaries in particular regions of the city. We now review the results of this approach.[6]

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[5] Most of the direct evidence of racial awareness and consideration was introduced as the first trial and is detailed in our first opinion. 466 F.2d at 830. Some is noted in our discussion of plaintiffs' regional challenges, *infra.*

[6] As a practical matter, it is difficult to determine the extent to which choices of boundaries within the region are the result of prior legitimate changes in boundaries outsde the region, and the effect, if any, of changes within the region upon other subsequently drawn wards outside the region.

A. *The 7th and 8th wards.*

Defendants cross-appeal from the district court's order modifying the boundaries of the 7th and 8th wards to eliminate invidious discrimination.[7]

At the outset the controversy on appeal concerning the 7th ward is not moot even though the election has been held in the modified 7th ward. If there were to be no redistricting in 1974, the present ward boundaries would apply in the elections in 1975 and 1979. Although the city council has adopted a resolution directing the preparation of a new redistricting ordinance to govern the 1975 election,[8] a new ordinance has not yet been enacted. Plaintiffs also represent that the subcommittee designated to prepare the new districting has requested a city department to prepare a new plan based upon the shape and location of wards in the 1970 ordinance.

In reviewing the district court finding of purposeful discrimination in drawing the 7th ward boundaries, it is convenient to consider two distinct stages of the formulation of the 7th ward as constituted in the 1970 ordinance: first the changes in formulation leading to the final Bellstudent map, and, second, the changes which occurred during the subcommittee proceedings.

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[7] The plan adopted by the district court results in both the 7th and 8th wards having a majority of black residents, and, as it happens, would produce a total of 16 wards with such majority, as would the Singer map. Although the new 7th ward appears reasonably compact, the new 8th ward appears to deviate from maximum compactness to a greater extent than did the 8th ward on the 1970 map.

[8] The resolution refers to a portion of our opinion with respect to the population disparities which first became apparent after the 1971 election. 466 F.2d at 844.

(i) *Comparison of the 1961 map with the final Bell-student map.*

A rectangular appendage of the L-shaped 9th ward occupied the southeastern corner of Chicago on the 1961 map. The main portion of ward 9 extended north from the southern city limit and west of ward 10; the appendage extended eastward to the Indiana state line and lay south of the 10th ward. Student intern Taylor's uncontroverted testimony is that the eastern appendage of the 9th ward was eliminated in the drafting of the Bell-student map in order to achieve compactness. The new 10th ward, occupying the southeastern corner of the city, was a rectangle, with greater north-south than east-west dimensions.[9]

The changes in the 9th and 10th wards were made before the 7th ward was drawn. As a result of adding the eastern appendage of the 9th ward to the 10th, the 10th ward would be overpopulated if its 1961 northern boundary were maintained.[10] To compensate, the northern boundary of the 10th was moved south.

The southern boundary of the 7th was and is the northern boundary of the 10th, and drawing that line further

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[9] The wards on the Bell-student map and in proceedings before the subcommittee were designated by letters rather than numbers. It is convenient, however, to refer to them by the number ultimately given to the ward containing most substantially the same area. This number is the same as the most substantially corresponding 1961 ward. The 1970 ward with a particular number almost always (and as a result of design) contains the residence of the alderman who represented the 1961 ward with the same number. As the changes in the map occur, the various wards are usually referred to as if there were a continuity in particular wards.

[10] Part of census tract 5501 and all 5502 were added to the 10th.

south necessitated either a southerly shift of the 7th, or creation of a new ward between the 7th and 10th. On the 1961 map, the northern boundary of the 7th was at 67th street. Taylor's undisputed testimony is that when first drawn by Bell and the students, the northern boundary of the 7th was south of 73rd street, thereby excluding the residence of Alderman Bohling (a Caucasian). Bell and the students regularly consulted a list of the names and addresses of all incumbents and attempted not to draw an incumbent out of the ward most substantially corresponding to his 1961 ward. Apparently for this purpose, the northern boundary of the 7th was shifted north to 71st street, thereby including Bohling's residence. Finally, in order to approach the desired numerical result, and because of the limitation of Lake Michigan at the east, the western boundary was shifted eastward, thereby decreasing the population in the 7th ward.

Comparing the racial composition of the 7th ward on the 1961 map and of the 7th ward on the final Bell-student map,[11] using 1970 census figures, it appears that the percentage of black residents in the 1961 7th was 48.3% and in the Bell-student 7th only 29.4%. The parties had believed the percentage of black residents in the 1961 7th ward was higher, and stipulated it was 55%-60%. Subsequent to the first appeal it was announced that black persons had been undercounted in the 1970 census, to the extent of 7.7% nationwide, although the distribution of the undercount in particular areas has not been determined. Presumably the percentages we have derived from census figures should be inceased to some unknown extent.

Thus the 7th ward on the 1961 map contained a majority or very near majority of black persons, while they are approximately a 30% minority in the 7th ward of the

[11] The record does not reveal the exact boundaries of the ward as first drawn; therefore comparison is made only with the final form.

final Bell-student map. Of course changes in other ward boundaries occurred as a result of this change. Given the evidence that the choices of boundaries were responses to legitimate or nonjusticiable concerns[11b] such as creating a more compact 9th ward, drawing the 7th so as to include an incumbent alderman, and seeking equality of population, and the absence of evidence pointing specifically to any racial motivation,[12] the difference between the percentages of black persons in these two areas will not, in our opinion, support an inference that the change in ward boundaries was purposeful minimization of black voting strength.[13] We are aided in reaching this conclusion by the failure of the Singer map to produce more black majority

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[11b] Following *Gaffney* v. *Cummings*, 412 U.S. 735, 751-54 (1973), it is not clear which redistricting decisions designed to achieve political ends or to allocate political power are nonjusticiable. The Supreme Court has stated, however, that the "'fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.' *Burns* v. *Richardson*, 384 U.S. at 89 n.16 Cf. *Gaffney* v. *Cummings*, [412 U.S.] at 752; *Taylor* v. *McKeithen*, 407 U.S. 191 (1972)." *White* v. *Weiser*, 412 U.S. 783, 797 (1973).

[12] There was testimony only that Bell was aware of the general racial effects of the change in shape of the 7th ward.

[13] The district court concluded that the 7th and 8th wards were drawn with the invidious purpose of minimizing black voting strength. In part the finding appears to be based on the difference in percentages of black residents between the 1961 7th and the student map 7th above noted, and in part on some switching of areas back and forth between the 7th and 8th, hereafter mentioned. The court found an absence of discriminatory purpose in the drafting of the Bell-student map. We agree. Because, however, the only substantial reduction in the percentage of black population between the 1961

or substantial black minority wards in the southeastern part of Chicago, encompassing the wards altered by the students, than did the 1970 map.[13b]

(ii) *From the final Bell-student map to the 1970 map.*

We now look for support for the inference of purposeful minimization of black voting strength in the subcommittee proceedings. The procedure followed is set out in our earlier opinion. 466 F.2d at 834-35. In forming the 7th ward, Alderman Keane began at its southern boundary, a natural line formed by the Chicago Skyway on the southwest and the Calumet River on the southeast. This boundary between the 7th and 10th differed from the student map only in that tract 4610 was included in the 7th ward as Alderman Keane drew it, and not in the 10th ward as the students drew it. 4610 is a triangular tract which, when put in the 7th, filled in the natural Skyway-Calumet River boundary of that ward. Its population is 22.55% black.

Plaintiffs' contention with regard to diminution as a result of the subcommittee proceedings focuses on the allocation of two groups of census tracts between the predom-

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[13] (Continued)
and the 1970 7th wards occurred in the drafting of the Bell-student draft, the finding that the 7th ward was intentionally drawn to create a white majority ward instead of a black majority ward, is in conflict with the finding that there was no discriminatory purpose at that stage.

[13b] The same approximate region is occupied by wards 6, 7, 8, 9, 10, 21 and 34, on the 1970 map and wards A, B, D, E, F, J, and K on the Singer map. On either map, there are four wards with a majority of black persons (6, 8, 21, and 34; D, E, J, and K), no wards with a substantial minority of black persons (35% to 50%), and three wards with less than 35% black population (7, 9, 10; A, B, F).

inantly black 8th ward and the predominantly white 7th ward, specifically tracts 4309, 4311, and 4312, tracts with 85-90% black residents, located next the northwest portion of the 7th ward (as enacted in 1970), and tracts 4604 and 4603, tracts with high percentages of white residents, located in the central western portion of the 7th ward as enacted.

Two of the three black tracts and both white tracts were within the 7th ward when first called by Alderman Keane. By the end of the first subcommittee session on the 7th ward, both white tracts were within the 8th ward and all three black tracts were in the 7th ward.[14]

At the end of the next session concerning these wards, one of the predominantly white tracts had been shifted back into the 7th and the two predominantly black tracts had been transferred into the 8th.[15]

During the third revision, considerably later, the predominantly white tract under consideration and remaining in the 8th ward was transferred to the 7th and the predominantly black tract under consideration and remaining in the 7th was transferred to the 8th.[16]

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[14] Specifically, at the first call tracts 4311 and 4312 (predominantly black) were in the 7th ward as were tracts 4603 and 4604 (predominantly white). Tract 4309 (predominantly black) was within the 7th ward. Alderman Keane next transferred 4604 into the 8th and 4309 into the 7th. Finally 4603 was transferred into the 8th. Keane apparently used an incorrect ward designation when describing this last transfer; although the census tracts being called were clearly in the 8th ward, designated O at the subcommittee proceedings, he explained he was about to redraw ward 21, designated N by the subcommittee.

[15] Specifically, tract 4603 was shifted into the 7th and 4311 and 4312 into the 8th.

[16] 4604 was moved from the 8th to the 7th and 4309 from the 7th to the 8th.

The transfers of two predominantly white tracts into the 7th ward and three predominantly black tracts into the 8th ward would be consistent with a purpose of minimizing black voting strength in the 7th ward by adding black residents to the 8th, where black residents already had a high majority. At least awareness of the racial composition was shown by Alderman Keane's comment to Alderman Cousins, the black alderman representing the 8th ward, concerning the transfer of tract 4603 from the 8th to the 7th—"I understand that there are a lot of Polish people in this Tract 4603 and that you don't want to represent them." Any tendency of these facts to support a finding that the changes were motivated by a purpose to minimize black voting strength is offset by the evident greater compactness of the 7th and 8th wards as finally drawn when contrasted to the earlier subcommittee versions.[17]

Moreover the net changes subsequent to the final Bell-student map had only the effect of decreasing the percentage of black residents in the 7th ward from 29.4% to 26.9% or somewhat larger figures if the census undercount of black persons be considered.

Summarizing our review of the district court finding of purposeful discrimination in drawing the 1970 7th ward, we consider: (1) the fact that although the change from the 1961 7th ward to the 1970 7th ward represented, in a sense, the loss of one black majority ward, the 1970 map produced 15 black majority wards (as compared with 11 on the 1961 map), with little persuasive proof that the number was held at 15 with a racially discriminatory purpose; (2) the fact that the greatest changes in the ward and its racial composition occurred in the preparation

[17] Tracts 4309, 4311, and 4312, when in the 7th formed a bulge to the west near the northern portion of the 7th, and tracts 4603 and 4604, when in the 8th, caused an appendage of that ward to jut into the center of the 7th and leave a relatively narrow waist at one point.

of the Bell-student map and were responses to legitimate or nonjusticiable concerns; (3) the fact that although there was evidence consistent with an inference that some of the changes made by the subcommittee were racially motivated, there were also legitimate explanations for some of them in terms of compactness, and, in any event, a relatively small reduction (2.5%) in the size of the approximately 30% black minority is insignificant as related to the issues here.[18] On the entire evidence we are left with the definite and firm conviction that a mistake has been committed,[19] and conclude that the finding as to the 7th ward is clearly erroneous. We understand that defendants do not seek a new election nor other change in representation of the 7th ward during the current term, which has less than one year to run. Therefore, we limit our reversal so as not to affect the tenure of the alderman now serving during the current term.

B. *The 14th and 16th wards.*

Plaintiffs assert that the findings of the district court with regard to the 14th and 16th wards entitle plaintiffs to relief as a matter of law. Plaintiffs' theory is that as first drawn by Bell and the students, the wards in which white aldermen Burke and Sheridan reside were majority black; that pursuant to Alderman Keane's explicitly racial instructions, the early student map was redrafted

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[18] This action does not present the question whether this degree of reduction would be constitutionally cognizable where a plaintiff alleged that the value of his or her vote within a particular ward had been impaired by invidious racial gerrymandering of the boundaries of that ward. The plaintiffs here are not dissatisfied with the wards in which they live, but have standing because they belong to a group living in many wards whose voting strength is allegedly purposefully diluted. See 466 F.2d at 845.

[19] See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

to place incumbents Burke and Sheridan in majority white wards; and that the changes involved in such incorporation created one or more additional such wards and one or more fewer wards of majority black population.

A careful examination of the findings reveals no basis for plaintiffs' theory. Properly, and consistently with plaintiffs' theory, the district judge found that Alderman Keane made racially explicit statements to Bell and the students;[20] that pursuant to Keane's instructions the Bell-student map was revised so as to place the residences of white alderman Sheridan and Burke in white majority wards;[21] and that the motivation for these changes was to ensure the reelection of these two "bright young men" by providing them with substantially white electorates.

But the district court made a further finding: the revisions made to "accommodate" the white incumbents did not, in drawing white majority wards, which would include those aldermen, produce a smaller number of black majority wards than had existed before the revision. Because the question raised by this action is whether the defendants purposefully minimized black voting strength and is not merely whether defendants' line-drawing was affected by racial considerations, this critical finding, if not clearly erroneous, is fatal to plaintiffs' claim. After carefully scrutinizing the record, we conclude that the finding that the changes in this region did not minimize black voting strength is not clearly erroneous.

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[20] See 466 F.2d at 839.

[21] Sheridan represented the 16th ward under the 1961 districting plan. By 1970, his old ward had become approximately 80% black. Under the 1970 plan he resides in the 15th ward which is 91% white. (Sheridan ran in 1971 and was defeated.) Burke represented the 14th ward under the 1961 districting plan. By 1970, his old ward was approximately 80% white. Under the 1970 plan he resides within the 14th ward which is 93% white. (He ran and was reelected in 1971.)

wards were "too black" (the inference is that he would not make such a statement unless two black majority wards were created by the Bell-student draft), upon one intern's interpretation of Keane's remarks as meaning the wards were majority black as drawn; and upon Taylor's testimony that subsequent to the conversation with Keane the wards in this region were shifted some unspecified distance to the west thereby incorporating more whites into the western portions of wards 14 and 15 on the 1970 map.[23] Although this evidence has some probative force, we cannot say that the district judge's finding that no substantial diminution in black voting strength resulted was clearly erroneous. Accordingly, notwithstanding the fact that the remand gave them an opportunity to develop additional statistical evidence on this issue, plaintiffs did not satisfy their burden of proof with regard to these wards.

III. *Dilution of voting strength of Spanish-language groups.*

We shall first consider plaintiffs' claims with regard to the group delineated as Puerto Rican; then, we shall examine plaintiffs' contentions about the Spanish-language group.

On appeal, plaintiffs do not press their initial argument that looking at the Puerto Rican population of Chicago on a city-wide basis, it appears that the voting strength of Puerto Ricans has been purposefully diminished. The district court found that there are only 49,500 persons in the Puerto Rican category; that they are scattered over an area consisting of three or four wards; and that it would be impossible to create a Puerto Rican majority in

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[23] Of course, without any evidence of the extent of this shift, it is impossible to deduce what the black population was prior to the westward movement.

any single ward. We conclude that these findings are not clearly erroneous.[24]

The only regional challenge with regard to the Puerto Rican group involves changes between the 1961 and 1970 boundaries of the 26th and 31st wards. Specifically, plaintiffs emphasize the exclusion from the 31st ward of the Puerto Rican region to the east (census tracts 2425 and part of 2426) and the incorporation of the non-minority tracts in the west (census tracts 2306 and 2313).

There is ample support in the record for the district court's finding that in accord with Alderman Keane's wishes, Bell, in drawing the final Bell-student map, extended the 31st ward as far west as possible in order to avoid the inclusion of additional Puerto Ricans in Keane's ward. See 466 F.2d at 838-39. The boundaries on the Bell-student map and on the 1970 map are very similar. Relief would be justified therefore had plaintiffs been able to demonstrate a cognizable dilution of Puerto Rican voting strength.

The district court found, however, that the failure to include the Puerto Rican regions in the 31st ward caused no discernible loss of Puerto Rican voting strength; we conclude that this finding is not clearly erroneous. The 1970 census figures reveal that as enacted ward 31 had a Puerto Rican population of approximately 25%. If the boundaries of the 1961 map had been retained ward 31 could have been as much as about 32% Puerto Rican.[25]

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[24] We note that plaintiffs' failure to introduce statistics reflecting the Puerto Rican population of the Singer map wards prevents us from determining whether the Singer map provided wards with more substantial Puerto Rican minorities than the 1970 map.

[25] Because of the absence of statistics in the record showing the Puerto Rican population of census tracts, this figure was derived by calculating the effect on the new 31st ward Puerto Rican population of deleting census tract

We do not think this change is sufficiently substantial, especially in light of the corollary decrease in Puerto Rican voting strength in the 26th ward if the 1961 boundaries are retained for the 31st ward.[26]

We also conclude that the district court's finding that there was no significant diminution in black voting strength as a result of the attempt to keep the 31st ward to the west is not clearly erroneous. Had the 1961 boundaries of ward 31 been retained, the black population would have increased only from approximately 1.4% to 1.7%.

During the second trial plaintiffs attempted to broaden the minority group being considered from that of Puerto Ricans to the Spanish-language group. We think the district court acted within its discretion in concluding that plaintiffs' failure to amend their complaint to conform with this additional proof and to add a named plaintiff representing the Spanish-language group prevented consideration on the merits.

Furthermore, as noted by the district court, the evidence introduced indicates that the Spanish-language group totals only about 80,000 persons, contains an unknown number of aliens who cannot vote in elections, and is so scattered as to constitute at best a substantial minority. Under these circumstances, we are not persuaded by the fact that the Singer map created one ward with approximately 42% Spanish-language population while under the 1970 map the most substantial Spanish-language minority comprises only 33% of the population of the ward.

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[25] (Continued)
2425 and half of census tract 2426 and adding census tracts 2306 and 2313. Looking at the figures most favorable to plaintiffs, we assumed that the Puerto Rican population of tracts 2306 and 2313 is 0% although the record reveals only that it is below 10%.

[26] The record enables us to calculate that assuming no other changes, deletion of census tract 2425 and part of census tract 2426 from ward 26 would decrease the Puerto Rican population from 20% to 17%.

IV. *Compactness and burden of proof.*

In our earlier opinion we indicated that deviations from compactness may be relevant in establishing invidious discrimination but that otherwise lack of compactness presents state law questions. 466 F. 2d at 833-34. Plaintiffs have not demonstrated that the district court failed to follow this principle.[27]

Plaintiffs argue that the district court applied incorrect rules governing the burden of proof. Specifically plaintiffs object to the failure of the district court to shift to defendants the burden of establishing the absence of discrimination following plaintiffs' introduction of historical evidence and statistical evidence and to the district court's requirement that plaintiffs' burden of persuasion be measured by the "clear and convincing" standard.

Turning to plaintiffs' first argument, it does not appear to be addressed to the strictly evidentiary question of which party has the burden of coming forward with evidence[28] but to the more substantive inquiry about whether the district court should have applied the "strict scrutiny" test, placing the burden of justifying the 1970 ordinance on the defendants. As urged by plaintiffs,

> "[P]revious decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of

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[27] We also note that despite plaintiffs' contention otherwise it appears the district court did consider whether the wards were compact under Illinois law and concluded that the wards were sufficiently compact to satisfy state law. This finding is not clearly erroneous.

[28] Because plaintiffs and defendants have come forward with extensive documents and testimonial evidence from which the relevant inferences can be drawn, if plaintiffs' argument is directed to shifting the burden of coming forward, it is of no merit at this stage of the proceedings.

> justification,' that the State must demonstrate that its [legislation] has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives. . . ." *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 16-17 (1973).

Because most of the Supreme Court decisions touching upon the allocation of burdens in racial gerry-mandering cases involve challenges to multimember districts, we first consider the bearing of such authority upon actions where single-member districts are claimed to dilute minority voting strength. The Supreme Court has long recognized that there is a "tendency" of multimember districts "to submerge minorities" but has not held that multimember districts are illegal *per se.* See *Whitcomb* v. *Chavis,* 403 U.S. 124, 142-43, 159 (1971) *and cases cited therein.* We think that if the cases reveal an unwillingneess of the Supreme Court to shift the "burden of justification" (as urged by plaintiffs here) in causes involving the somewhat "suspect" multimember districts, such an allocation would be even less likely in the context of a challenge to single-member districts.

Although we recognize that fundamental constitutional concerns about voting and racial discrimination are intertwined in racial gerrymandering cases, plaintiffs have not cited nor are we aware of any such action, involving either multimember or single-member districting, in which the "strict scrutiny" analysis, as defined in *San Antonio,* has been applied.

In *Whitcomb,* an action challenging state statutes creating a multimember district for the election of state senators and representatives, the Supreme Court stated that the "challenger [must] carry the burden of proving that multimember districts unconstitutionally operate to dilute or cancel the voting strength of racial . . . elements." The Court reversed the three-judge district court, which had invalidated the reapportionment plan, in part because

the Court did not think that plaintiffs had adequately demonstrated an actual dilution of voting strength.

In *Whitcomb,* unlike our case, plaintiffs conceded that the multimember districting was not purposefully designed to dilute the vote of minorities although such minimization was alleged to result. *Whitcomb, supra* at 149. Furthermore, when distinguishing the facts before it, from actions involving allegedly purposeful devices, the Supreme Court stated:

> "it needs no emphasis here that the Civil War Amendments were designed to protect the civil rights of Negroes and that the courts have been vigilant in scrutinizing schemes allegedly conceived or operated as purposeful devices to further racial discrimination. There has been no hesitation in striking down those contrivances that can fairly be said to infringe on Fourteenth Amendment rights." *Whitcomb* at 149.

Nonetheless, the above language does not mandate the "strict scrutiny" test urged by plaintiffs. In the racial gerrymander case cited with approval following this passage, the three-judge district court did not place the burden of justifying the legitimacy of the multi-representative districts upon the state. *Sims* v. *Baggett,* 247 F. Supp. 96, 107-10 (M.D. Ala., 1965). The other racial gerrymander case cited, *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), is not significant here as it involved a ruling on a motion to dismiss; all allegations of plaintiffs were assumed to be true.

More recently, the Supreme Court has affirmed the judgment of a three-judge district court which allocated the burden to the plaintiffs to establish that a Texas multimember constituency apportionment scheme minimized voting strength of black people and Mexican Americans. See *White* v. *Regester,* 412 U.S. 755 (1973), *aff'g Graves* v. *Barnes,* 343 F. Supp. 704, 720 (W.D. Tex., 1972). The Supreme Court did not review the trial court's disposition of the challenge to a single-member districting scheme in

a county, but we note that once again the burden had been placed squarely upon the challengers and no burden of justification was placed upon the state. *Graves*, 343 F. Supp. at 735. The Supreme Court cases of *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967) and *Wright* v. *Rockefeller*, 376 U.S. 52 (1964) also indicate that the "strict scrutiny" test has not been applied in racial gerrymandering cases.[29]

In sum, it appears that in *Sims*, *Kilgarlin*, and *Wright* (to the extent the Supreme Court cited them with approval or affirmed), the trial courts made their determinations whether plaintiffs had established unconstitutional racial gerrymandering upon all the evidence, without allocating the burden of justification to the defendants. See generally *Burns* v. *Richardson*, 384 U.S. 73, 88-89 (1966). We conclude that the district court in the instant case properly followed this approach.

We note that plaintiffs rely in their argument upon the facts suggesting past discrimination referred to in our earlier opinion, 466 F. 2d at 840-41. These facts were in the record on the first trial. It is implicit in our opinion that we did not deem them adequate to satisfy plaintiffs' burden. Indeed we considered whether plaintiffs had shown enough so that the matter could be resolved on a limited remand by the production of a map like the Singer map. We rejected this solution, and decided that a new trial of the issues was appropriate. 466 F. 2d at 843-44.

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[29] In *Kilgarlin* v. *Hill*, the Supreme Court in a per curiam opinion affirmed the judgment of the district court insofar "as it held that appellants [plaintiffs] had not proved their allegations that [the state legislative reapportionment act] was a racial ... gerrymander violating the Fourteenth Amendment [or] that it unconstitutionally deprived Negroes of their franchise." 386 U.S. at 121. It is clear from the opinion of the three-judge district court that the burden was allocated to plaintiffs to prove their allegations and that no "burden of justification" was placed on defendants. *Kilgarlin* v. *Martin*, 252 F. Supp. 404, 434-41 (S.D. Tex., 1966).

Plaintiffs' final argument is that the challenger's burden of persuasion should be measured by the more lenient "preponderance of the evidence" standard rather than the "clear and convincing" standard applied by the district court here. There is language in *Sims*, *Kilgarlin*, and *Wright* indicating that the presumption of constitutionality adheres to reapportionment statutes even when challenged on the ground of racial gerrymandering.[30] On the other hand in *Graves*, in a portion of the opinion not reviewed by the Supreme Court, the district court appears to have required only preponderating evidence of substantial if not egregious discriminatory effects caused by reapportionment. *Graves*, 343 F. Supp. at 735. We need not resolve this question here. From our analysis of the evidence and the observations of the district court, we are confident that the district court's assumption that a preponderance of the evidence would have been insufficient unless the proof could be found clear and convincing made no difference in the finding made.

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[29] (Continued)

In *Wright* v. *Rockefeller*, the Supreme Court affirmed, accepting the findings of the majority of the three-judge district court that "appellants [plaintiffs] failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines." 376 U.S. at 56.

[30] In *Sims* the district court stated: "Testing the constitutionality of the reapportionment Acts of the Legislature of Alabama by the foregoing standards, and after according to each all presumptions in favor of its constitutionality, we have concluded . . ." 247 F.Supp. at 105. In *Kilgarlin* the district court indicated that "clear proof" is needed to establish that the "Legislature harbored the sinister design of racial discrimination." 252 F.Supp. at 435. In *Wright*, the Supreme Court quoted and discussed without disapproval concurring District Judge Feinberg's statement that "Plaintiffs have a difficult burden to meet in attacking the constitutionality of this state statute." 211 F.Supp. at 469; 376 U.S. at 55-57.

V. *Attorney's fees and other costs*

Plaintiffs' application for attorney's fees for over 1,000 hours of services and other non-taxable costs was denied by the district court. This court joins with the district court in acknowledging that attorneys for the plaintiffs have been diligent. Not only have they caused a searching inquiry into an important public issue, but they have compiled a record which is full of important information which may be helpful in testing future districting for invidious discrimination. Their exposure of official lack of candor concerning the Bell-student map, 466 F.2d at 835, was itself substantial public service.

Nonetheless, particularly in view of the ultimate result, we find no abuse of discretion in denial of their application for fees and other expenses.

Defendants argue that the award of taxable costs to plaintiffs was erroneous and must be reversed if we reverse the judgment as to the 7th and 8th wards. Defendants, however, failed to appeal from the portion of the judgment awarding costs.

Insofar as the judgments and orders appealed from ordered a change in the boundaries of the 7th and 8th wards of the City of Chicago, they are reversed, except that said reversal shall not affect the status of the aldermen of those wards, now serving, before the end of the current term of office. In all other respects they are affirmed.

STEVENS, *Circuit Judge*, concurring. When resolution of a complex factual issue depends heavily on inferences to be drawn from circumstantial evidence, it is entirely appropriate to analyze a variety of statistical data. I agree completely with Judge Fairchild's assumption that a 35% minority may be sufficiently significant to justify consideration of the number of wards containing such a minority, as well as the number containing a majority of an allegedly disadvantaged group. Since I have expressed

the opinion that identifiable political and economic minority groups, as well as racial and ethnic groups, are entitled to constitutional protection against gerrymandering, see 466 F.2d at 848-853, it is important for me to add the caveat that my concurrence in Judge Fairchild's meticulously accurate opinion does not imply that I would necessarily equate a 35% minority with working control of a political subdivision. It is merely one among several yardsticks which the proponent of a gerrymandering claim is entitled to put forward; its significance would obviously vary from case to case.

Because the issues presented by this case are of unique importance and arise in an area of the law which is largely undeveloped, I would add one further comment on the significance of Judge Fairchild's opinion. It demonstrates, I believe, how important a careful and objective appraisal of the facts may be in a case of this character. It is judgments based on such appraisals that have made the process of case-by-case adjudication such an acceptable mechanism for orderly development of the law. In *Yick Wo* v. *Hopkins*, 118 U.S. 356, *Gomillion* v. *Lightfoot*, 364 U.S. 339, *Baker* v. *Carr*, 369 U.S. 186, and countless other landmark cases, the outcome was compelled by facts which spoke — indeed, shouted — for themselves. Although there are disturbing aspects of this case, and although, unlike those cases, the constitutional claim fails in this case, a thorough review of the evidence makes the required result perfectly clear. Those who would hereafter engage in gerrymandering must anticipate equally careful analysis of comparable claims in the future.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

William Cousins, Jr., A. A. Rayner, Jr., Leon M. Despres, William Singer, George Barr McCutcheon, Rev. Jesse L. Jackson, Rev. Richard A. Lawrence, Andrew Crout, Rosemary Gulley, Timuel D. Black, Jr., Graciano Lopez, Margaret B. Lurie, Susan Schwerin, Independent Voters Of Illinois and Committee For An Effective City Council,
Plaintiffs,

vs.

City Council Of The City Of Chicago, Richard J. Daly, individually and as Mayor of the City of Chicago and Board of Election Commissioners of the City of Chicago,
Defendants.

No. 70 C 3202

DECISION and ORDER

This cause came on to be partially retried pursuant to a decision of the Court of Appeals entered May 25, 1972. 466 F.2d 830 (7th Circuit). The controversy involves the allegedly discriminatory nature of the defendant's 1970 Ward map which was adopted by the City Council on November 6, 1970, pursuant to the Court of Appeals order in *Skolnick* v. *Mayor and City Council of Chicago, et al.*, 415 F.2d 1291 (7th Cir. 1969), *cert. den.*, 397 U.S. 954 (1970). Plaintiffs attacked that map on several grounds, but it was upheld by the trial court and an elec-

tion was held in which all of the plaintiff aldermen who ran for re-election were successful. The Court of Appeals, however, sent the case back for the re-examination of the discrimination issue by means of a re-trial.

Evidence was received in the form of a pre-trial stipulation, testimony in open court, certain portions of testimony given at the original trial, depositions and numerous exhibits. Very little new evidence was produced but much of the earlier evidence was shortened. We thus find ourselves in the rather unusual position of deciding substantially the same issues as have already been decided by the trial court, on substantially the same evidence.

Both parties have submitted post-trial arguments in written form, and the court considers itself fully advised in the premises. We find and conclude that the plaintiffs are entitled to but a portion of the relief prayed for in their Complaint, specifically a revision of the Seventh and perhaps the Eighth Wards as constituted in the 1970 map.

The first dispute between the parties is exactly what the re-trial was intended to consist of. The Court of Appeals defined this at 466 F.2d 838 and 843 as follows:

> . . . Although we are not prepared to measure, on this record, any discriminatory effect which may have resulted, we think that the findings must be set aside until the question has been more fully explored in the district court (p. 838).
>
> . . . we are unable to say that plaintiffs' evidence so clearly established that the ward boundaries were the product of purposeful discrimination as to permit this court to find. If the litigation concerned ordinary interests of the plaintiffs alone, we might well conclude that they must bear the burden of failure to establish more clearly all elements of their case.

a serious and substantial purpose for the benefit of the City (466 F.2d at 837).

Finally, these and other findings made by the Court of Appeals are the law of this case and are binding, particularly since the evidence on re-trial is substantially the same as on the first trial. Plaintiffs have argued that the wards drawn by the City Council lack "compactness" and should be set aside for this reason alone. We believe this was in effect concluded as a separate issue when the Court of Appeals said, with respect to the 1970 map:

> In considering the plaintiffs' claim, founded on state law, that the wards are not compact, we look for guidance to the Supreme Court of Illinois. In dealing with a requirement that senatorial districts be formed of compact territory, it has said: "There is a vast difference between determining whether the principle of compactness of territory has been applied at all or not, and whether or not the nearest practical approximation to perfect compactness has been attained. The first is a question which the courts may finally determine; the latter is for the legislature." Notwithstanding the irregularities in outline of wards, we could not determine from the present record, if it were our place to do so, that the principle of compactness was not applied at all.
>
> Nonetheless, it is our view that when other facts point to a probability that there has been invidious discrimination in drawing ward lines, deviations from maximum compactness may be considered along with these other facts in determining whether such discrimination (violating federal rights) has occurred. (466 F.2d at 833-834).

Turning to the facts, the Bell-student map has been found by the Court of Appeals to be a "trial run" for the task later performed at the public hearings. The

question thus arises whether this trial run was itself discriminatory. The three students testified that Bell engineered the details of that project and that Alderman Keane and others participated indirectly by commenting from time to time on the composition of certain wards. The question of "race" was discussed many times, but the plaintiffs offered no evidence of the contents of these particular discussions. No student testified that any statement was made during this "trial run" tending to induce discrimination or gerrymandering against any particular group and Bell did not testify.

Hence the validity of the "student map" must be determined from circumstantial evidence. This appears in two forms (a) statements of those who made suggestions or requests about specific wards during the student project, and (b) the end product, particularly to the extent reflected in the map adopted by the City Council.

Alderman Keane, in whose law library the students worked, had represented the 31st Ward for many years. It can be assumed that he wanted this ward to remain in substantially the same shape and location as before, a political consideration of the type which the Court of Appeals specifically excludes from consideration (466 F. 2d at 844). See also *Gaffney* v. *Cummings, et al.*, 412 U.S. 735 (1973). Bell resisted the inclusion of additional blacks or Puerto Ricans in the new ward by keepng it as far west as feasible. We believe this was presumably in accordance with Keane's wish. The ward ended up with 25% Puerto Ricans and 1.4% blacks. Had its boundareis been moved east or north, to include more blacks or Puerto Ricans, the dominant majority still would have remained overwhelmingly as before. We find and conclude that the considerations for

the shape and boundaries of the 31st Ward were primarily political and that the failure to include certain areas of blacks or Puerto Ricans caused them no discernible loss of voting strength.

Alderman Wigoda, who was one of Keane's law partners and had ready access to the law library, represented the 49th Ward. He wanted a certain precinct included which had been preliminarily excluded by the Bell-student draft. His desire was complied with, a small black area was moved out, and his ward remained 95% white. Had the original student draft been adopted, the 49th Ward would still have been overwhelmingly white. A similar change was made at the request of an unnamed alderman from the northwest sector of the City which is predominantly white, as shown by Plaintiffs' Ex. A-2. Thus these decisions were obviously political, not discriminatory.

Alderman Keane also told the students that Alderman Burke and Sheridan should not be drawn out of their wards or be put in a situation where they could not be re-elected, since they were bright young men such as were needed in the City Council. Sheridan had represented the 16th Ward, but the new map put him in the 15th Ward. The 16th Ward contained a 95% black majority in the final product and a black alderman was elected. Sheridan ran in the 15th Ward which was 91% white, but was defeated by another white. Burke had represented the 14th Ward which has a white majority of 93% in the new map, but did not run for re-election. The logical conclusion to be drawn from the colloquy and changes with respect to the 14th and 16th Wards is that political considerations, not discrimination, was the motivation, and no discrimination against blacks or Puerto Ricans was shown to result.

Finally, Alderman Despres' 5th Ward was discussed in the presence of the students. It remained a black ward by 57.5%, but the white plaintiff alderman was re-elected. He may have a justified complaint that his ward was made increasingly black in an effort to unseat him, but this does not constitute discrimination in the sense defined by the Court of Appeals as quoted above (p. 2-3).

The purpose of the Bell-student map as a trial run could have been either to help Alderman Keane produce a discriminatory result or to help him with the mechanics of drawing a map which complied with the one-man one-vote mandate of the Court of Appeals in *Skolnick* v. *Mayor and City Council of Chicago, et al.,* (supra p. 1). We have found no substantial evidence that the student map was intentionally discriminatory, and clearly the students did not so intend. It follows that the map was no more than a trial run for a new and difficult procedure which had never before been attempted.

Inasmuch as Alderman Keane did follow substantially the same procedure in building up the final map in the public hearings as his aide Bell had followed with the students, the results could be expected to be similar. The students' product could not be copied for the final product, however, because they worked from incomplete and inaccurate census figures, whereas the City Council's sub-committee had more correct and detailed versions. (Neither group, incidentally, had any census breakdown by race or national origin). Furthermore, in the course of the public hearings, additional individual aldermen's wishes were accommodated by adjusting boundaries from time to time. Finally, the sequence in which the areas worked on varied from the trial run, so that the ultimate fitting of the pieces together necessarily gave a different end result.

Besides the specific wards already referred to in connection with the Bell-student map, plaintiffs also introduced the prior testimony of Alderman Hoellen who had long represented the 47th Ward. When this Ward was first re-drawn by the City Council's sub-committee, Hoellen found that the boundaries had been drastically changed so that, in his opinion, a Republican could not be elected in it and furthermore that Hoellen himself lived south of its boundary. He protested violently to everyone within earshot, and he even enlisted the support of Democrats in the northerly wards who were affected by this preliminary version—specifically Simon of the 40th, O'Rourke of the 48th, and even Wigoda of the 49th. Keane thereupon referred the matter to Lewis W. Hill who, as Commissioner of the Department of Development and Planning, had possession of all of the census figures and was in charge, mechanically, of drawing various maps for the subcommittee. The problem was worked out to the extent that all of the affected aldermen were satisfied and voted for the final map, but the controversy over the North and Northwest wards did not involve blacks or Puerto Ricans to any extent. All of these wards were and remained overwhelmingly white, and no map produced by the plaintiffs suggest any change in these wards which would affect these proportions.

Another specific situation concerning which the plaintiffs introduced evidence was plaintiff Alderman Cousins' 8th and Alderman Bohling's 7th. The Seventh had a 55-60% majority of blacks before the ordinance. The Bell-student map reduced the blacks to 29.4% and the final product resulted in 26.9% blacks. Some of the blacks who had formerly been represented by Alderman Bohling, a white, were moved to the adjacent 8th Ward, repre-

sented by the plaintiff Cousins, a black. He now represente a ward consisting of 77.8% blacks. This is one instance where the intention to maintain the political *status quo* was subordinate to the intent to obtain a white majority in the 7th Ward. The evidence on this point is almost entirely circumstantial, but it is sufficiently clear and convincing.

With this one exception, plaintiffs did not prove any specific acts of discrimination against blacks. There is no evidence of invidious discrimination with respect to the 18th Ward, the shape of which apparently caught the attention of the Court of Appeals (466 F.2d at p. 839-40). Furthermore, no black alderman or ward with a black majority was replaced by a white counterpart, nor was any white alderman retained or enabled to be elected by dissipating a previous black majority in any ward or definable area.

In fact, fourteen black aldermen were elected from the new wards, whereas only ten had been elected on the basis of the pre-existing map. The final 1970 census figures show that black comprised 32.7% of the City's population, and the parties have stipulated that 15 wards or 30% contain a majority of blacks. If the new map were to contain 16 wards with black majorities, this would constitute 32% of the census population. These small differentials do not constitute circumstantial evidence of invidious or generalized discrimination.

Plaintiffs base an alternative argument on statistics and probabilities. The statistical argument begins with plaintiffs' term "border wards". These are wards which straddle black and white areas, but are further defined by plaintiffs to exclude wards which could not be drawn to contain a different white or black majority than in the

1970 map. This refinement eliminates six wards, four of which are black. Thus plaintiffs by their limited definition pick out 15 "swing" wards which could be drawn to contain a majority from either race. Only four of these 15 wards have black majorities, from which plaintiffs produced expert testimony that a 50-50 probability was converted into a 1 out of 17 probability.

This argument does not prove discrimination for several reasons. Many factors could properly be considered in drawing the map, according to the Supreme Court and the Court of Appeals decisions already alluded to. Such factors include compactness, contiguity, geographical and other physical characteristics, and politics. Furthermore the probability argument ignores the fact that the black and white areas are not sharply defined even in the "border" areas but graduate from black to white in varying degrees, as shown in Plaintiffs' Ex. A-2. The 50-50 probability would be valid, if at all, only if there were a sharp dividing line between black and whites and *no* other facts are involved.

Plaintiffs adopted the Court of Appeals' suggestion (466 F.2d at 843) and introduced a map made up of compact, contiguous wards of equal population. This map was constructed by the plaintiff's witness Reuben Singer and contained sixteen wards with black majorities. Thirteen of these wards are defined by plaintiffs as "border wards", and six of these contain black majorities. There is no evidence of the probabilities of six out of thirteen coming out black, but we do not believe that probabilities constitute clear and convincing proof of discrimination against blacks, particularly when limited to the particular type of "border wards" as defined by the plaintiffs.

On the other hand, the Singer map tends to prove that the City Council did not discriminate when it produced a map with 15 instead of 16 wards with black majorities. If Alderman Keane or the City Council had tried to discriminate (a risky venture when complying with a Court of Appeals order), they have produced a map with considerably less than 15 wards containing black majorities. They could conceivably have gerrymandered most of the black in the "border wards" into wards with white majorities and ended up with a relatively few solid black wards in the inner city and near west side. But no way has been suggested how the City Council could have created more than 16 wards with a black majority in a city containing 32.7% blacks, many of whom are scattered through white areas which must necessarily constitute white wards.

This statistical impasse renders the plaintiffs' case with respect to Puerto Ricans almost moot. The census figures which became available after the map was drawn showed only 49,500 persons in this category, not more than half of whom would be adults eligible to vote. A proper ward under the 1970 census figure was designed to contain 66,582 persons, give or take ½% (although the Supreme Court would now apparently tolerate considerably more deviation under the *Gaffney* decision, supra p. 6, and its companion *White, et al.* v. *Diana Regester, et al.*, 412 U.S. 755 (1973)). Plaintiffs' Exhibit KK-2 demonstrates that these Puerto Ricans are scattered over a population area which must consist of at least three and perhaps four wards. Hence there is no theory by which they could constitute a majority in any single ward. Tere is also practically no direct evidence of any special attention being given to this minority group,

with the exception of the 31st Ward boundary, and this evidence does not constitute clear or convincing proof that its voting strength was minimized in any significant way.

Plaintiffs attempted to shift their proof from the Latin-American minority alleged in the Complaint to the "Spanish-language" minority which is now designated in the census figures. However, they did not attempt to amend their complaint nor to add a plaintiff who represents this group as distinguished from Latin Americans. Furthermore the evidence concerning the Spanish language group reveals that, although totalling about 80,000 persons, it contains an unknown number of aliens, and it is so scattered as to constitute a minority in any ward, unless perhaps a special ward were to be drawn to accommodate this group. This is not necessary to satisfy the Court of Appeals' test quoted on page 3, above. Cf. *Ferrell, et al.* v. *State of Oklahoma, et al.*, 339 F.Supp. 73 (W.D.Okla. 1972); *aff'd* 406 U.S. 939 (1972). We find and conclude that plaintiffs' evidence concerning the Spanish-language group is not relevant to the pleadings or to the Court of Appeals mandate and in any event fails to prove any grounds for relief.

Plaintiffs' solution to the alleged discrimination is to throw out the entire 1970 map and start anew, in court. This goes too far, under our findings. The City Council's 1970 map complies fully with equality of representation (one-man, one-vote) and, generally, with compactness and other valid objectives. Only one ward, the 7th, has been shown to have been drawn to intentionally create a white majority where a black majority had previously existed, and most of the excluded blacks were apparently moved into the 8th Ward. Plaintiffs' other contentions are con-

cerned either with boundaries made for justifiable reasons or which did not change the voting strength of any minority group represented by plaintiffs to any significant degree. Therefore plaintiffs should now suggest a solution to the 7th Ward boundaries which will not result in invidious discrimination and will not change the racial majority of the other wards which we have found to be valid.

The defendants should also present their own suggestion for this area, particularly since a new map for the 1975 elections is now in the process of being drawn. We also see no reason why some sort of proportional representation could not be adopted for the 7th Ward, if necessary, although this point has not been argued (cf. *White, et al.* v. *Diana Regester, et al.,* supra p. 13; *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971)). Finally, if it appears that the solution might change the representation in all or part of the 7th Ward, a special election may be necessary.

It Is Therefore Ordered, Adjudged And Decreed that this case will be called for a status report on Thursday, July 19, 1973 at 10 a.m.

Enter:

/s/ Thomas R. McMillen
Judge, U.S. District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 21, 1974.

Before
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

WILLIAM COUSINS, JR., et al., Plaintiffs-Appellants, No. 73-1891, 73-2127 vs. CITY COUNCIL OF THE CITY OF CHICAGO, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Divsn. (70 C 3202)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby, DENIED.

or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

IV.

Illinois Revised Statutes (1971), ch. 24:

"§ *21-36. City to have fifty wards.*)

"The City of Chicago shall be divided into fifty wards. In the formation of wards the population of each shall be as nearly equal as practicable and each shall be composed of contiguous and compact territory."

"§*21-38, Redistricting every ten years.*)

"On or before the first day of December, of the year following the year in which the national census is taken, and every ten years thereafter, the city council by ordinance redistrict the city on the basis of the national census of the preceding year. All elections of aldermen shall be held from the existing wards until a redistricting is had as provided for in this article."

FILED
MAR 5 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-887

A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW GROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS AND COMMITTEE FOR AN EFFECTIVE CITY COUNCIL,

Petitioners,

vs.

CITY COUNCIL OF THE CITY OF CHICAGO, RICHARD J. DALEY, individually and as Mayor of the City of Chicago, and BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS CITY COUNCIL OF CHICAGO AND RICHARD J. DALEY, MAYOR

WILLIAM R. QUINLAN
Acting Corporation Counsel
of the City of Chicago
511 City Hall, Chicago, Illinois 60602

Attorney for Respondents, City Council of the City of Chicago and Richard J. Daley, Mayor

DANIEL PASCALE
EDMUND HATFIELD
Assistant Corporation Counsel

Of Counsel

Midwest Law Printing Co., Chicago 60601, Financial 6-2363

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-887

A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW CROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS AND COMMITTEE FOR AN EFFECTIVE CITY COUNCIL,

Petitioners,

vs.

CITY COUNCIL OF THE CITY OF CHICAGO, RICHARD J. DALEY, individually and as Mayor of the City of Chicago, and BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS CITY COUNCIL OF CHICAGO AND RICHARD J. DALEY, MAYOR

OPINIONS BELOW

In the courts below the first-named plaintiff in this litigation was William Cousins, Jr., an alderman of the City of Chicago and a principal witness at the two trials. The case was then known as *Cousins et al.* v. *City Council of the City of Chicago et al.* However, Alderman Cousins has not joined in this petition for certiorari.

The case was tried twice and twice appealed. The first trial resulted in judgment for the defendants; the opinion of the district court is reported at 322 F. Supp. 428 (N.D., Ill., 1971). In the first appeal the Court of Appeals for the Seventh Circuit concluded with a reversal and remandment for a new trial; this is reported at 466 F. 2d 830 (1972), cert. denied, 409 U.S. 893 (1972).

The second trial ended in judgment for the plaintiffs as to the districting of one ward, the 7th, and for the defendants as to all of the 49 other wards. That judgment is to be found at 361 F. Supp. 530 (N.D., Ill., 1973) and it has been reproduced in Appendix B of the petition for certiorari.

On the second appeal the judgment of the district court, insofar as it was in favor of plaintiffs, was reversed, but affirmed in all other respects. The opinion of the Court of Appeals in the second appeal is published in 503 F. 2d (adv. sh.) 912 (7 Cir., 1974), and it has been reproduced in Appendix A of the petition for certiorari.

A ward map of the City of Chicago, according to the 1970 ordinance, is reproduced in Appendix A at the end of this brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition for certiorari.

STATEMENT OF THE CASE

As Circuit Judge Stevens noted in his concurring opinion (503 F. 2d at 925), in a case of this character, it is important that there be "a careful and objective appraisal of the facts." In consequence, this statement of the case is regretably more detailed and extensive than is ordinarily desirable.

The Background of the Present Litigation

Since 1941 Illinois law has provided by Section 21-36 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch. 24, par. 21-36):

> "The City of Chicago shall be divided into 50 wards. In the formation of wards the population of each shall be as nearly equal as practicable and each shall be composed of contiguous and compact territory."

Redistricting every ten years is mandated by Section 21-38 of the same statute, which directs:

> "On or before the first day of December, of the year following the year in which the national census is taken, and every ten years thereafter, the city council shall by ordinance redistrict the city on the basis of the national census of the preceding year."

However, the phrase "as nearly equal as practicable" had, prior to 1970, come to be very liberally construed.

The impact of *Baker* v. *Carr,* 369 U.S. 186 (1962), was first brought home to Chicago through the efforts of a layman filing as a *pro se* plaintiff. On November 22, 1966, he instituted a class action in the district court on behalf of the voters, charging that the wards, as drawn in the

1961 ordinance, on the basis of the 1960 census, violated the one-person, one-vote rule. The district court deferred action in this case until after this Court, in *Avery* v. *Midland County, Texas,* 390 U.S. 474 (1968), had determined that the one-person, one-vote principle is applicable to municipalities. Meanwhile, Chief Judge William J. Campbell of the district court, having found that the *pro se* plaintiff, to whom he gave credit for having initiated the action, was incapable of adequately representing the entire voting population "in such a far reaching lawsuit," appointed the Chicago Bar Association as *amicus curiae* to assure that the interest of the voters would be adequately represented by professional counsel. The bar association designated former Acting Solicitor General Robert L. Stern and two other lawyers, one black, to carry out that assignment, which they did by filing briefs and actively participating at every stage of the case.

After public hearings before two Special Commissioners, one a Republican and one a Democrat, appointed to marshall the evidence, and the filing of their interim report, the district court entered a final order on September 11, 1968, finding that the 1961 ordinance contained impermissible deviations, under the 1960 census, from the one-person, one-vote rule. The judgment forbade the holding of any more general aldermanic elections under the 1961 apportionment ordinance. In addition, Chief Judge Campbell directed the City to file with the court on or before November 1, 1970 (later extended to November 10, 1970), a fully detailed and lawfully enacted redistricting ordinance, based on the forthcoming 1970 census figures and conforming with the requirements of the United States Constitution, which would serve as the basis of the general aldermanic election of 1971.

The court of appeals affirmed the judgment of Judge Campbell on December 18, 1968. *Skolnick* v. *Mayor and City Council of Chicago,* 415 F. 2d 1291 (7 Cir., 1969), *cert. denied,* 397 U.S. 954 (1970).

The 1970 reapportionment ordinance, with which this case is concerned, was thereupon prepared under the supervision and close scrutiny of the district court.

A five-man subcommittee of the City Council was designated by that body's committee on committees and rules to prepare the reapportionment ordinance. The first preliminary census tract figures were filed with the district court and sent to the parties by the U. S. Bureau of the Census in September, 1970.

The redistricting ordinance and map were then drawn at 16 public hearings conducted by the subcommittee between October 13, 1970, and November 5, 1970. The transcript of the hearings ran to 716 pages. The mathematical data on population, on which the redistricting was based, was taken from publications of the U. S. Bureau of the Census, as required both by state statute and federal court order. The transcript shows that the ordinance was drafted in accordance with an unvarying procedure, wherein census tracts and enumeration districts were identified in sequence and official population figures correlated with compact, contiguous territory. A running total was recorded until the figure of 66,582 (1/50th of 3,329,090, the total population of Chicago according to the 1970 census, as tabulated at the time of the enactment of the ordinance) was approximated insofar as possible. The sessions were diligently attended by the present plaintiffs-petitioners.

The completed ordinance and map—which permitted a spread of no more than 9/10ths of one percent between the

most populous and the least populous ward—was reported by the subcommittee to the full City Council, where, after debate, the ordinance was adopted on November 6, 1970, by a vote of 41 to 6.

On November 14, 1970, after a contested hearing, the district court, in an opinion by Judge Campbell, held the 1970 ordinance constitutional. *Skolnick* v. *Mayor and City Council of Chicago,* 319 F. Supp. 1219 (N.D. Ill., 1970).

At this district court hearing some of the present plaintiffs, at the last moment, sought to intervene and to file an amended complaint including a claim that, notwithstanding the close approximation to precise equality of populations presented by the ordinance, nevertheless the ordinance was invalid by reason of alleged racial and ethnic gerrymandering which, so it was urged, diluted the voting strength of blacks and Puerto Ricans. Judge Campbell held there was "no evidence" of this and denied the last minute attempt to file an amended complaint.

The Court of Appeals for the Seventh Circuit, on December 14, 1970, affirmed the judgment of Judge Campbell, but limited its affirmance to rejection of the claim that the wards of Chicago, under the new 1970 ordinance, did not sufficiently approximate equality of populations. In an unreported order (*Skolnick* v. *Mayor and City Council of Chicago,* 7 Cir., No. 18878), the court of appeals said:

> "We conclude that, considering the ordinance from the point of view of mathematical precision alone, the district court's decision that the ordinance fulfills the required standards (*Reynolds* v. *Sims,* 377 U.S. 533, and *Kirkpatrick* v. *Preister,* 394 U.S. 526), is to be affirmed."

But, with respect to the claims of racial and ethnic gerrymandering, the court of appeals expressly declared that

the claims had not been fully litigated and, consequently, there was nothing to prevent a new action concerning them from being filed.

The First Trial of This Case

Promptly, on December 22, 1970, the present plaintiffs filed such a suit. Because the general aldermanic election, scheduled for February 23, 1971, was then imminent, District Judge Joseph Sam Perry, to whom the new case was assigned, expedited the trial. Hearings began on December 29, 1970, and continued through January 18, 1971. Five of the plaintiffs—Cousins, Rayner, Despres, Singer and McCutcheon—were aldermen at the time the suit was filed. Cousins, Despres and Singer are still incumbents.

Because the evidence presented by the plaintiffs at the second trial was practically the same as their evidence at the first trial, with the exception of a draft ward map prepared by the plaintiffs and introduced at the second trial, and because the reason for the unique remand, under which the second trial was conducted, cannot be made clear without allusion to the evidence at the first trial, we shall here indicate the nature of that evidence. Indeed, the opinion of the court of appeals, from which certiorari is here sought, itself states that many of the pertinent facts are set out in its earlier opinion and "will not be repeated here" (503 F. 2d at 913; App. A1).

Plaintiffs' case, as originally conceived, was based upon the theory that, under the Constitution, the proportion of wards in which the majority of the population is of black or Puerto Rican identification must be the same as the proportion of the number of persons of such racial or ethnic identification is to the total population.

The court of appeals rejected this theory with the statement (466 F. 2d at 843):

> "There is no principle which requires a minority racial or ethnic group to have any particular voting strength reflected in the council. The principle is that such strength must not be purposely minimized on account of their race or ethnic origin."

Distribution of Blacks and Puerto Ricans Among the Wards of Chicago

According to the 1970 census figures available at the time of the oral argument of the first *Cousins* appeal in the court of appeals on March 16, 1971, the total 1970 population of Chicago was 3,367,000. Of this total 1,103,000 persons, or 32.7%, were black.

The opinion of the court of appeals (466 F. 2d at 834), found that, under the 1970 ordinance, in 15 of the 50 wards a majority of the residents are black. The population of blacks in each of the wards is set out at that point in the opinion of the court of appeals.

Plaintiffs contended that if the lines had been drawn with indifference to the color of the residents, there would have been more wards with a black majority.

Testimony at the trial also tended to show that there are about 80,000 residents of the city who are of Puerto Rican origin. Most of these people live in the 26th, 31st and 33rd wards. As the wards are drawn, Puerto Ricans are a very substantial minority in each of these three wards: 40-45% in the 26th, 30-35% in the 31st, and 25-30% in the 33rd. Plaintiffs claimed that if the wards had been drawn differently, Puerto Ricans might have had a majority in one or possibly two wards.

Testimony of the Opinion Witnesses

In support of their position the plaintiffs presented the testimony of three experts on demography and statistics. One of these witnesses was Dr. Philip Hauser, director of the Population Research Center at the University of Chicago, who had been acting national director of the 1950 census and chairman of the advisory committee for the 1960 and 1970 censuses. He stated that the 1970 ward lines were the progeny of the succession of ward maps of the last 40 years and even of times prior to that and that the character of the distribution of blacks among the wards was related to the dense concentration of blacks in certain areas of the city, areas sharply divided from bordering areas with only a small percentage of black residents. Hauser concluded that the number of wards crossing racial or ethnic dividing lines, in which blacks or Puerto Ricans are the minority, is "far above the level that probability expectations would indicate, or another way of saying that, it is perfectly clear to me that the ward lines on that map could not possibly have been drawn by anyone who was color blind."

The court of appeals did not find the statistical experts convincing. It declared (466 F. 2d at 840) that "a demonstration that the wards could, with the census figures at hand, have been drawn with similar equality of population, and no less compactness, but into more wards having a black or Puerto Rican majority, would be more persuasive than a mere opinion that if the wards had been drawn with indifference to race, a greater number of black or Puerto Rican majority wards would have been more probable."

However, the court of appeals found (466 F. 2d at 840, 841) more significance in the testimony with respect to the

history of racial distribution in Chicago and the configuration of prior reapportionment ordinances as tending to show "that as the black population of Chicago increased, the redistricting ordinances in 1931, 1947 and 1961 had changed ward boundaries in a manner corresponding to the growth of areas in which the residents were predominantly black, so as to keep at a high figure the number of wards in which a majority of residents were white." The court states (at 841) that such testimony should not be found meritless without careful scrutiny.

The Students' Map

During the first trial it was disclosed that shortly prior to the drafting of the 1970 reapportionment by the subcommittee, a group of three graduate political science students at the University of Illinois (Chicago campus), working under the direction of two faculty members, had drawn a tentative map of their own, using preliminary census figures. They had done this work in the library of the law office of the chairman of the subcommittee that prepared the draft of the 1970 ordinance. These quarters had been made available at the request of one of the faculty members, who was also an administrative assistant to the chairman.

Actually, as was set forth at length in the record, a great deal of patient, laborious mathematical research, by way of analysis of census tracts and enumeration districts and their realtion to both the geography and demography of the city, was required, so that the City Council would be in a position to know what viable choices were open to it in redistricting. That preliminary work was done, not by students, but by professionals, working under the direction of the Commissioner of Development and Planning.

But reapportionment at the time was a topic of intense interest to political science students, and the project was obviously appropriate academically. Furthermore, the drafting of the 1970 reapportionment was the first time the wards of Chicago had been districted in accordance with the rigors of the one-person, one-vote rule, as then recently directed by this Court in *Avery* v. *Midland County, Texas,* 390 U.S. 474 (1968). It was therefore no doubt of interest to the chairman of the subcommittee to see how the students worked out their project under the supervision of his administrative assistant, to note what problems they encountered, to gather an impression of how difficult it might be to fit the pieces of the puzzle together.

According to the students' testimony, the chairman, then Alderman Keane, dropped into the library occasionally while the students were at work, and made a few casual remarks about their efforts. He seemed particularly interested in facilitating his own re-election and that of two young proteges of his, Aldermen Burke and Sheridan. In his own ward (the 31st) there had been a marked increase in the Puerto Rican population in the east end of the ward and he suggested to the students that, in their draft, they move the eastern boundary of the 31st ward further west.

The chairman also expressed concern, according to the students, with keeping incumbent Burke in the 14th ward and incumbent Sheridan in the 16th. Both of these aldermen are white. Keane thought it might be difficult to reelect them because of the changing racial composition of those wards. But as the opinion of the court of appeals in the first appeal noted (466 F. 2d at 839), although these wards, as drawn by the students, would probably have been predominantly white, the 16th ward, as constituted

by the City Council, is 95.3% black. Sheridan did not attempt to run for re-election in the 16th, but moved to the 15th, which is 91.2% white, where he ran and was defeated. A black woman candidate was elected alderman in Sheridan's former ward, the 16th. Burke was re-elected in the 14th ward, which is 93.1% white.

Plaintiffs' petition for certiorari states (p. 4), "The court of appeals, in its first opinion, noted that the City's reapportionment plan had been based upon a reapportionment map drawn in secret by Thomas Keane, the alderman in charge of the City Council's reapportionment subcommittee. (466 F. 2d at 835)." Actually the opinion of the court of appeals described the students' map as "an earlier and confidential version of a proposed ward map [that] had been prepared . . . with Alderman Keane's knowledge and approval. . . [W]e consider . . . such preparation was at least a trial run for the process later conducted at public hearings."

In fact the students' trial run fell far short of achieving equality of populations, within permissible variances. Addition of the population figures, census tract by census tract, according to the preliminary census tract counts used by the students, reveals that the most populous ward on the students' map was their 17th, with 77,826 residents, and their least populous ward was their 45th, with 54,946 residents—a spread of 22,880—more than one-third of the students' target figure of 66,400. In contrast, on the official ward map adopted by the City Council, there is a spread of no more than 9/10ths of one percent between the most populous and the least populous ward.

Evidence Concerning the 7th Ward

Under the 1970 redistricting, the 7th Ward has 26.9% black residents, according to the 1970 census. This and the following facts are in accord with the findings of the court of appeals in the first appeal. 466 F. 2d at 838. The 7th Ward includes the area of Chicago known as the South Shore. It lies between Lake Michigan on the east and the 8th Ward on the west. The 8th Ward has 77.8% black residents and is represented by plaintiff Alderman Cousins, who is black.

The former 7th ward, under the 1961 ordinance, extended farther north and not so far south. At the time of the first trial, it was believed that, because of shifts of population, the old 7th ward had come to have a constituency between 55% and 60% black. (Final census figures, first available in 1972, showed that the proportion of blacks was 48.3%.) The 7th ward was represented by Alderman Bohling, who is white. According to William Taylor, one of the student internes, "Mr. Bell," (the administrative assistant to the chairman of the subcommittee) "wanted to be able to keep Alderman Bohling in the 7th Ward." And, as drawn on the students' map, the 7th Ward had 29.4% black residents.

The court of appeals found (466 F. 2d at 838) that at the subcommittee hearings, census tract 4603, with a population of 8,885, of which 93.3% were white, was at one stage included in the predominantly black 8th Ward, represented by plaintiff Alderman Cousins, who, as previously stated, is black. It was further found by the court of appeals that, during the proceedings, this white tract, 4603, was shifted into the 7th Ward, a change offset by the transfer of predominantly black tracts to the already predomi-

nantly black 8th Ward. Alderman Cousins testified at both trials that the chairman of the subcommittee remarked to him, "I understand they have a lot of Polish voters over here, and you don't want to represent them." Keane testified he did not recall making that statement. In any event, there is no evidence in the record that Cousins repudiated the alleged transfer of Polish voters out of his ward—which, according to his attorney's argument, would be invidious diminution of the voting strength of an ethnic group. The Fourteenth Amendment protects all persons, including whites.

The court of appeals concluded (466 F. 2d at 838):

> "It must be said that putting Tract 4603 into the 7th Ward tended to make that ward more compact. If the statement was made, however, it indicated at least *awareness of the racial composition of the area being transferred, although we do not suggest that proof of awareness alone would establish invidious discrimination.*" (Emphasis supplied.)

The First Opinion of the Court of Appeals

On May 25, 1972, the court of appeals filed its 2-to-1 opinion, reversing the judgment of Judge Perry and remanding for a new trial "consistent with this opinion." Judge Stevens dissented.

The majority opinion, written by Judge Fairchild, and concurred in by Judge Cummings, attached importance to the student internes' testimony that the racial and ethnic composition of several wards—the 7th, the 14th, the 16th and 31st—had been mentioned either by the chairman or his administrative assistant. The court also considered it significant that the chairman, in his deposition, received in evidence, had failed to mention the draft trial map

drawn by the students in his own office. The majority concluded (466 F. 2d at 843):

> "Plaintiffs did not produce other persuasive circumstantial proof that the ward boundaries were the product of purposeful discrimination. . .
>
> "[W]e are unable to say that plaintiffs' evidence so clearly established that the ward boundaries were the product of purposeful discrimination as to permit this court so to find. If the litigation concerned ordinary interests of the plaintiffs alone, we might well conclude that they must bear the burden of failure to establish more clearly all the elements of their case. We are of the opinion, however, that the type of rights involved here requires special care that claims of impairment be thoroughly inquired into.
>
> "We conclude . . . that the proper and just result is a new trial of the issues."

An extensive dissenting opinion was filed by Circuit Judge Stevens. He observed that since district boundaries are drawn by the legislative process, they will inevitably reflect group interests. He deemed improper an inquiry into the motives of individual legislators, such as the majority opinion embarked upon, and which, by its remand, it directed to be more fully pursued in the trial court. Judge Stevens repudiated this approach, terming it a view consistently rejected by the Supreme Court since 1810. Judge Stevens remarked (466 F. 2d at 856, 857):

> "[I]t demeans the legislative process to inquire into private conversations between aldermen or to draw an invidious inference from the facts that members of the Council are 'acutely aware' of the racial composition of changing areas of the city. Of course they are. Responsible legislators are expected by their constituents, black and white, rich and poor, to be informed about such matters."

plaintiffs' case at the first trial, were, however, rendered unnecessary at the second trial by the supervening availability of the final, official 1970 U. S. Census figures on the number of blacks and Spanish-speaking ethnics in Chicago, census tract by census tract, statistics that were not published until 1972.

Plaintiffs' Demonstration Map

The only improvement in the plaintiffs' case was their production of their own draft ward map of Chicago (Plaintiffs' Exhibit DD), allegedly drawn without thought of race and with attention directed solely to numerical equality of the wards and compactness. The map was drawn by Rubin Singer, a board member of plaintiff Independent Voters of Illinois, with the help of several non-professional volunteers. This was the only attempt by the plaintiffs to comply with the suggestion of the court of appeals (466 F. 2d at 843) that one or more maps be drawn, on the theory that they might be "persuasive circumstantial proof . . . of purposeful discrimination."

Plaintiffs' map contained 16 wards with a black majority—only one more ward with a black majority than the 15 wards with a majority established by the official 1970 reapportionment. The Singer map failed to draw a single ward with a Puerto Rican majority.

The area of the 7th Ward was designated on the Singer map as Ward F, and this contained a black minority of about 21%, whereas the actual 7th ward under the 1970 ordinance is 26.9% black.

The Students' Map at the Second Trial

The testimony by the students at the second trial added nothing not mentioned at the first trial that in any way

indicated that any invidious racial or ethnic discrimination had entered into the official 1970 reapportionment. William Taylor, the student witness on whom the plaintiffs principally relied, testified that during the fortnight the students were working on the map, the subject of the "racial or ethnic makeup of the neighborhoods" "came up" "maybe 30 or 40 times." But there is not the slightest indication in the record of the substance or even the tone of these remarks. For all that appears in the record to the contrary, the discussion may have been marked by pronounced solicitude for civil rights.

Alderman Keane, chairman of the subcommittee, testified and categorically denied that he had used the students' map in his own work on the preparation of a ward map for the Council's consideration. He stated that it would have been utterly beyond his mental powers, or those of anyone else, to have memorized the outline of the ward boundaries on the students' map, census tract by census tract, and to have then employed them, at public hearings held across the street, in the drafting of the official map then in process of becoming, devoid as it was of guidelines.

The plaintiffs made no attempt to rebut this testimony of Keane by demonstrating that the ward boundaries on the students' map could be memorized. In fact, it was admitted by the plaintiffs that the census tract map of Chicago, which Keane used in calling out census tracts at the subcommittee hearings, was without guidelines. Plaintiff Alderman Despres, who testified he attended, as did plaintiff Alderman Cousins, almost every subcommittee hearing, said he made a point of sitting up close, at Keane's elbow, where he kept an eye on Keane throughout the proceedings. Despres stated he examined the developing draft of

the official map, while it was being drawn, for tell-tale lines or marks, but admitted he found none. Despres even testified that he saw another observer examine the map with a microscope, with no different result.

The Second Judgment of the District Court

On July 19, 1973, Judge McMillen entered judgment at the conclusion of the second trial. He held that such political considerations as may have influenced the redistricting were non-justiciable political questions. The court further found that no purposeful, invidious diminution of the voting strength of any racial or ethnic group had been proven —except in the 7th ward.

To correct the racial gerrymandering it concluded had occurred in the 7th ward, the district court ordered an exchange of approximately half the populations of the 7th and 8th wards, resulting in the creation of two new wards, each with a 52% black majority. A special election was ordered and held in the 7th ward, but not in the 8th. The white incumbent in the 7th ward did not run in this special election, and a new alderman, a black, was elected and took office.

The Second Opinion of the Court of Appeals

The plaintiffs appealed the general judgment that no racial gerrymandering had occurred in 49 of the 50 wards of the city. The City Council and Mayor cross-appealed the findings and orders with respect to the 7th and 8th wards.

The second appeal was heard and decided by the same panel of judges that sat on the first appeal. But this time

they were unanimous, and they ruled in favor of the City Council and the Mayor on all issues.

On the authority of this Court's opinions in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), *White* v. *Regester*, 412 U.S. 755 (1973), *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967), and *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), the court of appeals rejected the plaintiffs' contention that in cases of alleged racial gerrymandering, the legislative enactment is to be deemed "inherently suspect," and that, in consequence, the burden of proof must be shifted to the defendants to justify the legislation. The court of appeals held that the usual rule, that legislation is presumed to be constitutional, is applicable to cases of alleged racial gerrymandering. Therefore, the burden is on those attacking the enactment to prove it invalid, not by a mere preponderance of the evidence, but by "clear and convincing evidence" to a moral certainty. This burden of proof the court found the plaintiffs had not met by presenting proof of prior, historic discrimination.

As to the 7th ward, the court of appeals concluded that the transcript of the subcommittee proceedings showed that the 1970 changes in its boundaries had been occasioned by prior changes in the 9th and 10th wards, effected so as to make the 9th ward more compact—a fact overlooked by the district court. A detailed analysis of the complex situation is set forth in the opinion of the court of appeals (503 F. 2d at 916-919).

The 9th ward on the 1961 map had been L-shaped and occupied the south-east corner of the city. The main portion of ward 9 extended north from the southern city limits and was situated west of ward 10. The appendage extended eastward to the Indiana state line and lay south

of the 10th ward. Student interne Taylor testified that on the student map the eastern appendage of the 9th ward was eliminated and the new 10th ward occupied the southeast corner of the city. The same change was made on the official map, resulting in greater compactness.

The drafting of the official map of the 7th ward went through three revisions, in which various census tracts were moved back and forth and in and out of the 7th ward in order to achieve close approximation to the target of equality of population with the other wards. The court of appeals found that these changes resulted in a reduction of about 2.5% in a black minority of approximately 30% and were insignificant as related to the issues of this case.

The contention that the 14th and 16th wards had been racially gerrymandered was also disallowed. The court found that the territory encompassed by the 14th, 15th and 16th wards could not, because of its clearly delineated racial makeup, be divided, as plaintiffs claimed, into three compact wards, two of which would be majority black.

Likewise, the 31st ward was found not to have been gerrymandered to the disadvantage of Puerto Rican voters. The transfer of some Puerto Ricans in the eastern end of the 31st ward to the 26th ward had resulted in increasing their strength in the 26th ward, where they constitute a sizeable minority. The court of appeals concluded that, under the 1970 ordinance, the 31st ward has a Puerto Rican population of about 25% and that, if the census tracts in question had been retained in the 31st, at most there would have been no more than a 32% Puerto Rican minority in that ward.

The Puerto Rican population of Chicago is so distributed, the court of appeals found (466 F.2d at 921),

that it is at present impossible to create a single ward with a Puerto Rican majority.

In addition, the court ruled that the wards as districted by the 1970 reapportionment were sufficiently compact to satisfy state law, which is controlling in the matter of compactness.

However, the court limited its reversal of the district court's invalidation of the 7th ward boundaries so as to permit the present incumbent to finish out his term, which will be concluded in April, 1975.

On October 21, 1974, the court of appeals denied plaintiffs' petition for a rehearing *en banc* before the entire court.

REASONS FOR DENYING THE WRIT

If by "the issues presented" is meant the principles invoked by the petitioners—claims of impairment of voting rights on the basis of race and ethnic origin—then the issues presented unquestionably are of "central importance," as the Petition for Certiorari claims (p. 6). But if the phrase "the issues presented" is meant to include, as it should, the actual matrix of facts and alleged facts within which petitioners are attempting to develop an application of those constitutional principles, then without doubt this is by no means a case of "central importance."

In any event, whether or not this case is of "central importance," the relevant constitutional principles have already been thoroughly clarified by the decisions of this Court. Though the concurring opinion of Judge Stevens in the court of appeals (503 F.2d at 925) does speak of this as "an area of the law which is largely undeveloped," he did not find the result reached insufficiently buttressed by the Supreme Court precedents referred to in the opinion of the court of appeals, which Judge Stevens characterized (*id.*) as "Judge Fairchild's meticulously accurate opinion."

That opinion was the result of two extensive trials and two extensively briefed appeals, in all of which the controversy was subjected to very strict, very detailed judicial scrutiny.

I.

NO BLACKS OR PUERTO RICANS HAVE BEEN "PURPOSEFULLY EXCLUDED" FROM THEIR VOTING RIGHTS BY THE PRESENT CHICAGO REAPPORTIONMENT ORDINANCE.

THE COMPOSITION OF THE CITY COUNCIL OF CHICAGO, COUPLED WITH THE CENSUS FIGURES, DEMONSTRATES THAT THERE HAS BEEN NO INVIDIOUS DISCRIMINATION IN THIS RESPECT.

Throughout their petition for certiorari (pp. 2, 4, 5, 6, 7, 9, 10, 14) plaintiffs discourse on blacks and Puerto Ricans "being purposefully excluded" in the Chicago reapportionment as though blacks and Puerto Ricans had been intentionally excluded from voting in Chicago.

Nothing of that sort has happened. The blacks and Puerto Ricans of Chicago are not situated in anything resembling the lot of the blacks of Tuskegee, Alabama, who were at one time debarred from having any voice whatsoever in their municipal affairs by the device of redrawing the boundaries of the city so as to place blacks outside the city limits. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

Petitioners' quotation (Petition, p. 14) of *Carrington* v. *Rash*, 380 U.S. 89, at 94 (1965), that "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible," is not only wholly inapposite, but misleading. The Texas statute there involved barred all members of the armed forces ordered into Texas from voting in state elections, no matter how long they resided in that state. The instant case, on the contrary, has nothing whatsoever to do with barring anyone from voting.

The persons whom petitioners profess to be concerned about were simply transferred from one municipal legislative district to another. They continued to have the right to vote in all municipal, county, state and federal elections. There has been no restriction on their becoming candidates for public office. It should also be noted that the redistricting here under scrutiny is relevant only to the election of aldermen. In all other elections, it makes not a particle of difference in which ward of Chicago the voter resides.

It should be again noted that the wards of Chicago, under the present districting, have been found both by the district court and the court of appeals to be equal in population within a maximum variance of 0.9%. *Skolnick* v. *Mayor and City Council of Chicago*, 319 F. Supp. 1219 (N.D., Ill., 1970), aff'd, 7 Cir., No. 18878 (1970) (unreported); cert. den. 397 U.S. 954 (1970). Therefore, the transfers in question in no way impaired or diminished the right of any individual to vote.

Furthermore, the alleged diminution in voting strength claimed by the petitioners relates to the aggregate strength of the racial or ethnic group, if it should choose to act as a group and presumably vote for a candidate of its own racial or ethnic identification.

But the decisions of this Court have certainly made it clear that "there is no right to have proportional representation of races, creeds or colors in the legislative so long as there is an equal opportunity for all to register and vote in districts of substantial population equality." *Kilgarlin* v. *Martin*, 252 F. Supp. 404 (S.D. Tex. 1966; expressly aff'd as to the issue of racial gerrymandering, sub. nom. *Kilgarlin* v. *Hill*, 386 U.S. 120, at 121 (1967).

In *Kilgarlin*, the three-judge district court noted (at 437) that the plaintiffs' witnesses argued in terms of the "voting strength of racial elements . . . not as a right of equality in the weight of votes, but as a right to be represented by a person of one's own race," and the court characterized this as "an erroneous legal premise." In support of this ruling, the court cited *Reynolds* v. *Sims*, 377 U.S. 533, at 537 (1964), and *Mann* v. *Davis*, 245 F. Supp. 241 (ED, Va. 1965); aff'd sub. nom. *Thornton* v. *Davis*, 382 U.S. 42 (1965). It also quoted with approval from Mr. Justice Douglas' dissenting opinion in *Wright* v. *Rockefeller*, 376 U.S. 52, at 66, 67 (1964), where he said:

> "Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines."

And the three-judge district court concluded with the following quotation from *Mann* v. *Davis*, 245 F. Supp. at 245:

> "The concept of 'one person, one vote,' we understand, neither connotes nor envisages representation according to color. Certainly it does not demand an alignment of districts to assure success at the polls of any race. No line may be drawn to prefer by race or color."

Nevertheless, even if proportional representation were required or permitted under the law, which it is not, even then the present districting of the wards of Chicago would pass muster. According to the 1970 U.S. census, which Illinois law mandates must be used as the basis of reapportionment, blacks constitute 32.7% of the population of Chicago. At the time of the last trial, 15 of the 50 wards had black majority populations and 14 of the 50 aldermen were black. That is, 30% of the wards had populations

gave them an opportunity to develop additional statistical evidence on this issue [substantial diminution in black voting strength], *plaintiffs did not satisfy their burden of proof.*" 503 F.2d at 920; Petition, p. A16. (Emphasis supplied.)

Petitioners contend that the rule adopted by the lower courts herein, requiring the plaintiffs in a racial gerrymandering case to prove intentional diminution of their voting strength because of race or ethnic origin "means that few if any victims of racial gerrymandering will ever be able to prove their case" (Petition, p. 7). The answer to that is to be found in the opinion of the court of appeals, which explains (503 F.2d at 914, fn. 1; Petition, p. A3):

> "Purposeful minimization of the voting strength of a minority racial or ethnic group is the sort of conduct proof of which is unlikely to be direct or specific. A finding that the challenged districting reflects such discrimination must usually rest on inference from circumstances. One approach, where such a claim is made, is to compare the number of black majority wards in the challenged map with another map which might equally reasonably be drawn, but with more such wards, and assess whether the difference is more probably explained by a purpose to discriminate than by legitimate considerations."

The plaintiffs attempted to comply with that suggestion. They presented a draft ward map of their own, known as the Singer map, after its principal draftsman, Rubin Singer, a board member of plaintiff Independent Voters of Illinois. According to a table set out in the margin of the opinion of the court of appeals (503 F.2d at 915; Petition, pp. A4, 5), the Singer map outlines 16 wards out of 50 with a majority black population, as compared with 15 on the official map, and 19 wards with 35% or more black

population, as compared with 18 wards with 35% or more black population on the official map. The Singer map failed to create a single ward with a population in which Puerto Ricans were in the majority. The court of appeals found the Singer map insufficiently persuasive to cause it to declare that the decision of the district court that 49 of the 50 were not racially gerrymandered was clearly erroneous (503 F.2d at 915; Petition, p. A5). But the court of appeals also found, with respect to the 7th ward, the one ward the district court found to be racially gerrymandered, "the failure of the Singer map to produce more black majority or substantial minority wards in the southeastern part of the city" an aid in reaching its conclusion reversing the district court as to the 7th ward.

Since the petitioners failed to make out a prima facie case of invidious discrimination, there was no occasion to shift the burden of proof and to require the City to justify the 1970 reapportionment ordinance pursuant to the "strict scrutiny" test, or any other test.

III.

THE "STRICT SCRUTINY" DOCTRINE IS NOT APPLICABLE TO LEGISLATIVE DISTRICTING CASES INVOLVING CLAIMS OF RACIAL GERRYMANDERING.

This question is academic, since the petitioners did not prove a prima facie case of invidious discrimination, and therefore the point was not reached where a determination of which test of justification of the ordinance would be called for.

Petitioners candidly admit (Petition, p. 10) that "the court of appeals correctly noted that there are no decisions of this Court 'involving either multi-member or

single-member districting' in which 'strict scrutiny' analysis, as defined in *San Antonio* [*School District*] v. *Rodriguez*, 411 U.S. 1 (1973), has been applied." (503 F.2d at 208; App. A207) and that "[t]he court of appeals therefore concluded that the 'strict scrutiny' analysis should not apply."

It appears to be the position of petitioners that the court of appeals thereby erred because "this Court's prior gerrymandering decisions do not resolve, or even squarely consider the question." Evidently petitioners do not regard the actual practice of this Court in racial gerrymandering cases as of any moment.

The precedent most similar to the case at bar appears to be *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). That involved an attack on the apportionment of the multi-member Marion County (Indianapolis), Indiana, state legislative district, on the ground that it illegally minimized and cancelled out the voting power of the cognizable black racial minority in the ghetto, as evidenced by fewer legislators having resided in the ghetto than would have been proportionate to the ghetto's percentage of the county's population. Concerning the burden of proof in the establishment of such a claim, this Court could not have spoken more clearly. It said (at 143):

> "But *we have insisted that the challengers carry the burden of proving* that multi-member districts unconstitutionally operate to *dilute or cancel the voting strength of racial or political elements.*" (Emphasis supplied.)

This is very far from the theory urged by petitioners that once it has been shown that, in drafting a reapportionment, the legislators transferred certain voters from

> one district to another while knowing that those voters were of a certain racial or ethnic identification, then at that point the burden of proof shifts to the legislature to justify the ordinance under the "strict scrutiny" test, which properly means that the legislation must then be shown to be necessary to the realization of a compelling state interest, and that no less discriminatory means can be found that will encompass that compelling goal. *Whitcomb* v. *Chavis* is dispositive of that illusion.

Nor can the basic theory of petitioners withstand examination in the light of *Wright* v. *Rockefeller*, 386 U.S. 52 (1964). There it was charged that the New York congressional apportionment statute deprived non-white voters and citizens of Puerto Rican origin of rights guaranteed by the 14th and 15th Amendments, by concentrating them in one of four Congressional districts of Manhattan, which the plaintiffs termed (at 54) "Ghettoizing the Island of Manhattan," since, so it was contended, it was impossible to have districts such as these unless they "were drawn with regard to race." The evidence showed that the proportions the Negro and Puerto Rican populations of the district bore to the total populations of the respective districts were 86.3%, 28.5%, 27.5% and 5.1%. A dismissal of the action was affirmed by this Court on the ground (at 55, 56) that, although the plaintiffs had introduced evidence which might justify an inference that racial considerations motivated the apportionment, other inferences were equally or more justifiable, particularly the concentration of black and Puerto Rican voters in certain areas, which "made it difficult, even assuming it to be permissible, to fix districts so as to have anything like an equal division of voters among the districts" (at 57). As the late Justice Black stated in writing for the Court (at 55, 56):

> "Plaintiffs have a difficult burden to meet in attacking the constitutionality of the state statute."

Only a few weeks ago this Court again reaffirmed this principle. In *Chapman* v. *Meier,* ..... U.S. ....., 43 LW 4199 (Jan. 27, 1975), in reversing a district court ordered reapportionment of the North Dakota Legislative Assembly, the unanimous opinion of this Court, written by Mr. Justice Blackman, stated (43 LW at 4204):

> "[T]here must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. There must be evidence that the group has been denied access to the political processes equal to the access of other groups. *White* v. *Regester,* . . . 412 U.S. at 765-766."

In the case at bar the court of appeals was correct in concluding (503 F.2d at 922, 923; Petition, p. A20) that although fundamental constitutional concerns about voting and racial discrimination are intertwined in racial gerrymandering cases, "plaintiffs have not cited nor are we aware of any such action, involving either multi-member or single-member districting, in which the 'strict scrutiny' analysis, as defined in *San Antonio,* has been applied."

The petition for certiorari in no way remedies this lack of authority for this basic contention of the plaintiffs. None of their citations are reapportionment cases.

Petitioners invoke (Petition, pp. 13, 14) *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), in which this Court invalidated a Tennessee election statute requiring a residence in the State of at least one year as a precondition of voting. But there the plaintiff was deprived of the right to vote; he could not vote at all. Although he was a bona-fide resident he was stripped of "a fundamental political right . . .

preservative of all rights." This Court held (at 342, 343) that such a clear deprivation of constitutional rights must be measured by "a strict equal protection test" and such laws are unconstitutional unless the State can demonstrate that the enactment is "necessary to promote a compelling governmental interest."

The blacks and Puerto Ricans of Chicago have not been deprived of the right to vote. They are freely allowed to exercise their constitutionally protected right to participants in aldermanic elections in Chicago on an equal basis with all other citizens of the city.

Jones v. *Georgia,* 389 U.S. 24 (1967), cited in the petition (p. 15), was not concerned with the constitutionality of legislation, which, as the court of appeals ruled (503 F.2d at 924; Petition, p. A23), carries a presumption of constitutionality, even when it is a reapportionment enactment "challenged on the ground of racial gerrymandering," a presumption that can be overcome not by a mere preponderance of the evidence, but only by "clear and convincing" evidence, i.e., to a moral certainty. *Jones* was a murder case in which the defendant, a black, claimed he had been denied equal protection through the systematic practice of excluding blacks from juries in the county.

Turner v. *Fouche,* 396 U.S. 346 (1970), cited in the petition (p. 15), also related to a practice resulting in the disqualification of a high disproportion of blacks from jury service.

Neither was *Keyes* v. *School District, No. 1, Denver, Colorado,* 413 U.S. 189, cited in the petition (p. 15), related to the constitutionality of legislation. *Keyes* was an injunction proceeding brought with the aim of desegregating the schools of Denver. It was not disputed that the

school board had followed an impermissible policy in one district, and on account of that fact this Court remanded the case for further trial.

The petitioners' conception of the "strict scrutiny" test is unduly simplistic and mechanical. They would do well to study Mr. Justice Marshall's analysis of the nuanced "spectrum of standards [applied] in reviewing discrimination allegedly violative of the Equal Protection Clause" in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, at 98, 99, 36 L.ed. 2d 16, at 81 (1973).

In any event, the aldermen who drafted and enacted the Chicago reapportionment ordinance were obviously concerned with being re-elected. The court of appeals recognized in the first appeal of this case (466 F.2d at 844, 845) that such partisan political gerrymandering is non-justiciable, and reaffirmed that principle in the second appeal (503 F.2d at 917; Petition, p. A9). In support of this holding the court of appeals cited this Court's "affirmance of a decision that political gerrymandering does not raise questions under the Federal Constitution." *WMCA* v. *Lomenzo*, 238 F. Supp. 916, at 925 (SD, NY, 1965), aff'd per curiam, 382 U.S. 4 (1965). It also noted several three-judge district court decisions holding political gerrymandering non-justiciable: *Sims* v. *Baggett*, 247 F. Supp. 96, at 104 (MD, Ala. 1965); *Sincock* v. *Gately*, 262 F. Supp. 739, at 833 (DC, Del. 1967); *Meeks* v. *Avery*, 251 F. Supp. 245, at 250 (DC, Kan. 1966); *Bush* v. *Martin*, 251 F. Supp. 484, at 510, 513 (SD, Tex. 1966); and, in particular, *Wells* v. *Rockefeller*, 311 F. Supp. 48, at 54 (SD, NY, 1970), aff'd 398 U.S. 901 (1970).

Of more recent vintage than those familiar citations is this Court's decision in *Gaffney* v. *Cummings*, 412 U.S. 735

(1973), which upheld the constitutionality of a "political fairness" principle consciously and overtly used in reapportioning the Connecticut General Assembly. This policy "aimed at a rough scheme of proportional representation of the two major political parties. Senate and House districts were structured so that the composition of both Houses would reflect 'as clearly as possible . . . the actual [statewide] plurality of vote on the House or Senate line in a given election.' Rather than focus on party membership in the respective districts, the Board took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats." (412 U.S. at 738, 37 L.ed. 2d at 303). This Court held that that was not invidiously discriminatory. The opinion of the Court, written by Mr. Justice White, concluded (412 U.S. at 754, 27 L.ed. 2d at 313):

> "[W]e have not . . . attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States."

IV.

THE ISSUE OF THE CORRECTNESS OF THE COURT OF APPEALS' REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT AS TO THE 7th WARD HAS BEEN WAIVED.

Petitioners include among their Questions Presented the issue of whether the court of appeals erred in reversing the district court's finding that the 7th ward had been racially gerrymandered. (Petition, p. 3.) However, petitioners have failed to argue the point.

As a result, we have nothing to which to respond on the issue of the 7th ward and review of the court of appeals' reversal of the district court's judgment as to the 7th ward has, we submit, been waived.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, or, in the alternative, the writ should be granted and the judgment of the court of appeals summarily affirmed.

Respectfully submitted,

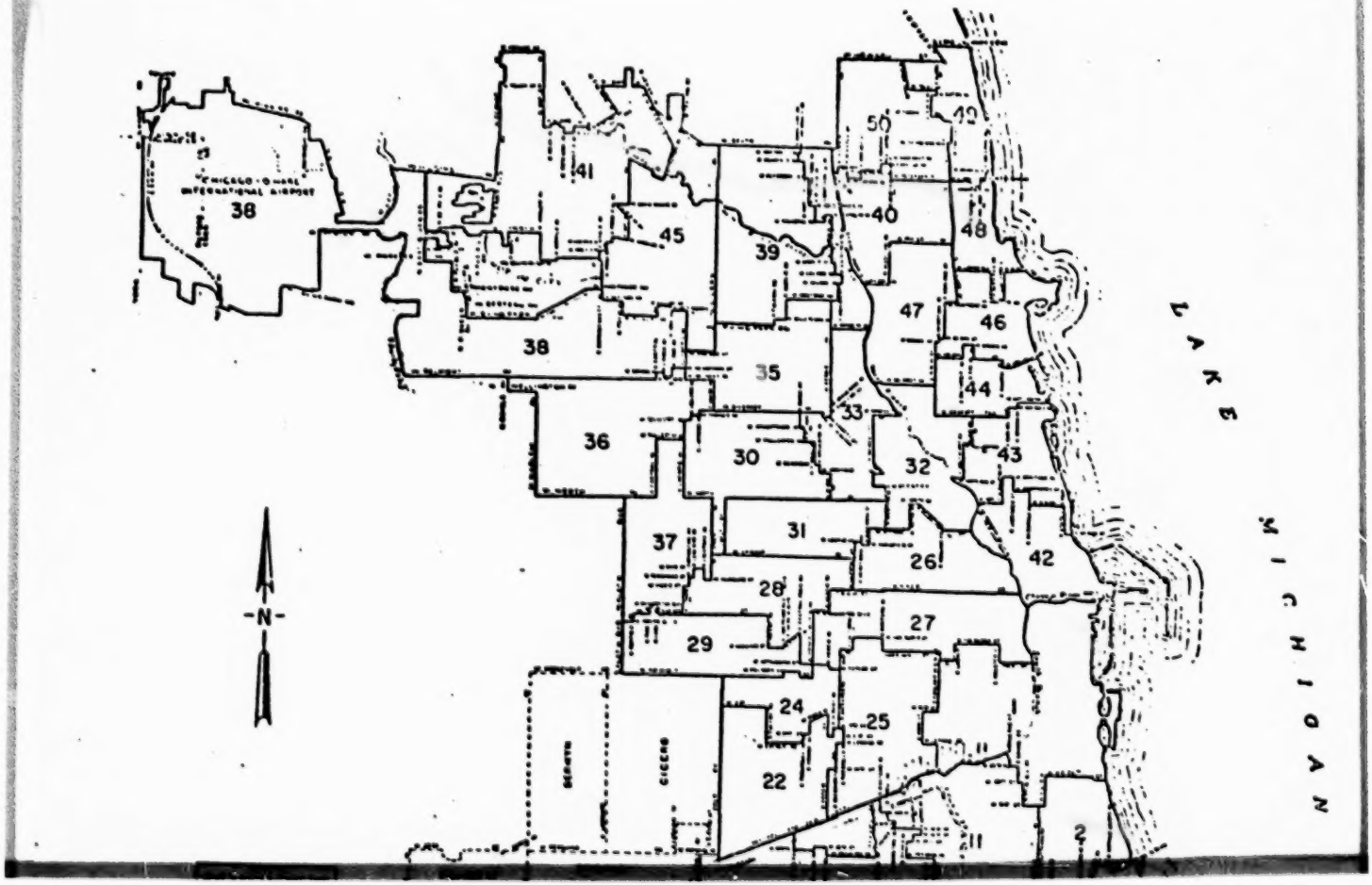
WILLIAM R. QUINLAN
Acting Corporation Counsel
of the City of Chicago
511 City Hall, Chicago, Illinois 60602

Attorney for Respondents, City Council of the City of Chicago and Richard J. Daley, Mayor

DANIEL PASCALE
EDMUND HATFIELD
Assistant Corporation Counsel

Of Counsel

February 28, 1975.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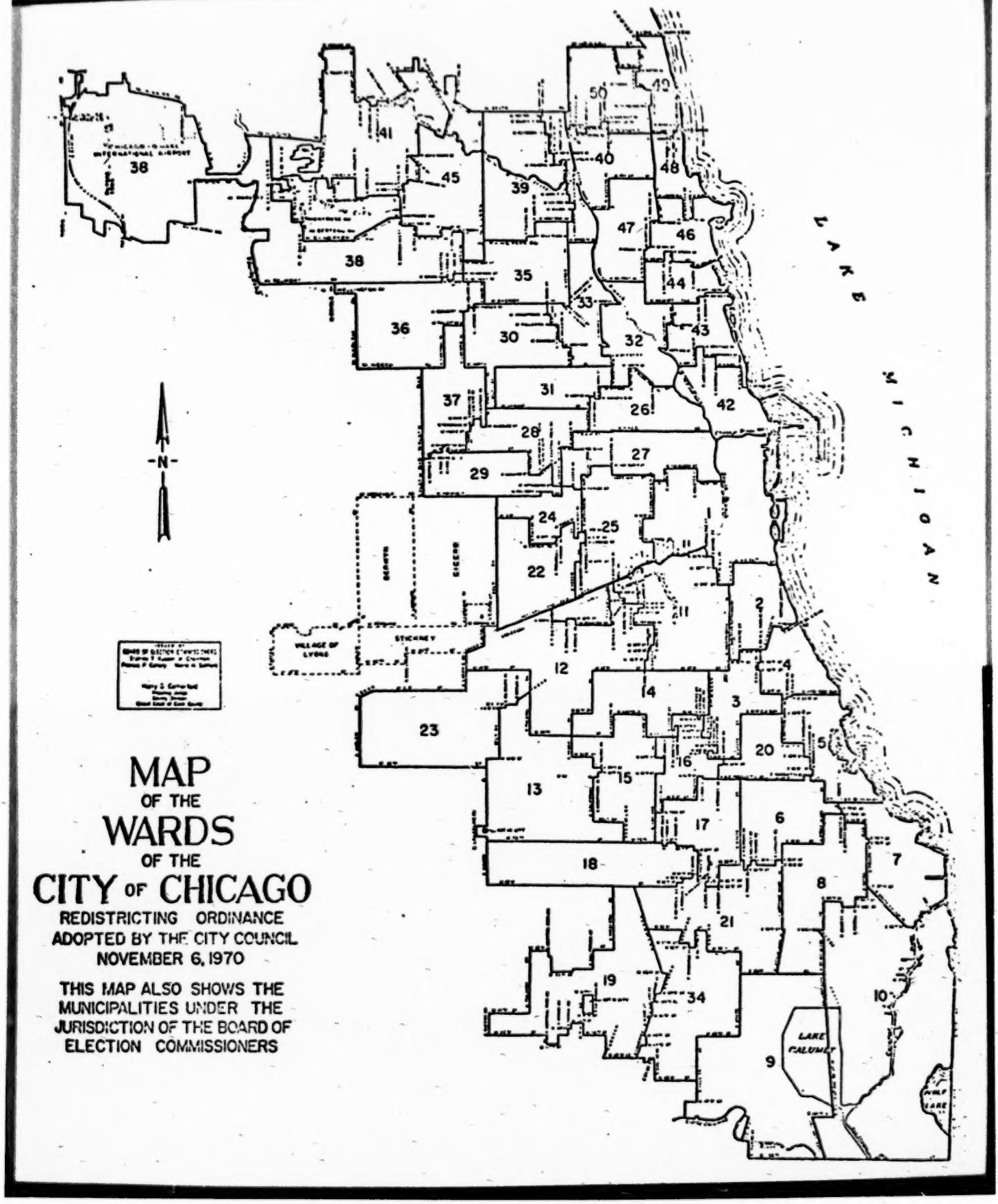

MAP
OF THE
WARDS
OF THE
CITY OF CHICAGO

REDISTRICTING ORDINANCE
ADOPTED BY THE CITY COUNCIL
NOVEMBER 6, 1970

THIS MAP ALSO SHOWS THE
MUNICIPALITIES UNDER THE
JURISDICTION OF THE BOARD OF
ELECTION COMMISSIONERS

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No. 74-887

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In the

Supreme Court of the United States

OCTOBER TERM, 1974

A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW CROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS, COMMITTEE FOR AN EFFECTIVE CITY COUNCIL,

Petitioners,

vs.

CITY COUNCIL OF THE CITY OF CHICAGO, RICHARD J. DALEY, individually and as Mayor of the City of Chicago, and BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF CITING NEW AUTHORITY PURSUANT TO SUPREME COURT RULE 24(5)

MICHAEL L. SHAKMAN
R. DICKEY HAMILTON
208 South LaSalle Street
Chicago, Illinois 60604

ARAM A. HARTUNIAN
ROBERT PLOTKIN
33 North Dearborn Street
Chicago, Illinois 60602

ROBERT L. TUCKER
11 South LaSalle Street
Chicago, Illinois 60603

HOWARD C. EGLIT
6 South Clark Street
Chicago, Illinois 60603
Attorneys for Petitioners

The Scheffer Press, Inc.—(312) 263-6850

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-887

A. A. RAYNER, JR., LEON M. DESPRES, WILLIAM SINGER, GEORGE BARR McCUTCHEON, REV. JESSE L. JACKSON, REV. RICHARD A. LAWRENCE, ANDREW CROUT, ROSEMARY GULLEY, TIMUEL D. BLACK, JR., GRACIANO LOPEZ, MARGARET B. LURIE, SUSAN SCHWERIN, INDEPENDENT VOTERS OF ILLINOIS, COMMITTEE FOR AN EFFECTIVE CITY COUNCIL,

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Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF CITING NEW AUTHORITY PURSUANT TO SUPREME COURT RULE 24(5)

INTRODUCTION

Petitioners respectfully file this supplemental brief pursuant to Supreme Court Rule 24(5) to draw to the Court's attention a new decision of the Fifth Circuit that is in direct conflict with the decision of the Seventh Circuit in the present case. That conflict is an additional reason for granting a writ of certiorari to review the decision of the Seventh Circuit.

THE FIFTH CIRCUIT HAS ADOPTED THE STRICT SCRUTINY TEST IN GERRYMANDERING CASES—THUS CREATING A CONFLICT AMONG THE CIRCUITS.

After petitioners had filed their Petition for Certiorari in this case, the decision of the Fifth Circuit in *Reese* v. *Dallas County, Alabama*, 505 F. 2d 879 (1974), became available. That decision holds—contrary to the decision of the Seventh Circuit in the present case—that the "strict scrutiny" test of *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), applies to gerrymandering litigation and renders unconstitutional a plan that discriminates against urban voters. In the present case both the district court and the Seventh Circuit rejected the strict scrutiny test even though both courts found that Blacks and Puerto Ricans had been purposefully excluded in drawing certain ward boundaries.

In *Reese* the Fifth Circuit, sitting *en banc*, reviewed the constitutionality of a scheme which provided for at-large election of county commissioners, but which required three of the four commissioners to reside in rural portions of the county. (505 F. 2d at 882)

In ruling the plan unconstitutional the Fifth Circuit held that a strict scrutiny test was to be applied and that such a test required a compelling state interest to sustain the plan:

> "*The standard of review by which justifications of the plan are to be judged is not entirely clear.* See Casper, Apportionment and the Right to Vote: Standards of Judicial Scrutiny. 1973 Sup. Ct. Rev. 1, 29-32. Compare Kramer v. Union Free School District, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969), with McDonald v. Board of Election Com'rs of Chicago, 394 U.S. 802, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969). *The most recent articulation of the standards of review under the Equal Protection Clause appears in Dunn v. Blumstein, 405 U.S. 330, 335, 92 S. Ct. 995, 999, 31 L. Ed. 2d 274 (1972):*

> To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.

The Court concluded that statutes burdening the right to vote 'must meet close constitutional scrutiny' and be 'necessary to promote a compelling state interest.' Id. at 336-337, 92 S. Ct. at 1000. See Kramer v. Union Free School District, supra; Bullock v. Carter, 405 U.S. 134, 143, 92 S. Ct. 849, 855-856, 31 L. Ed. 2d 92.

> "This standard has been applied irrespective of any political or racial implications in the one man-one vote cases concerning congressional districts. Disparities in the weight accorded the votes of residents of different places has been sufficient to trigger strict scrutiny, even though location is not a suspect classification. See, e.g., Ellis v. Mayor and City Council of Baltimore, 4 Cir., 1965, 352 F. 2d 123, 129. Here the presence of political discrimination, which the Supreme Court has suggested is a suspect classification, underscores the propriety of a strict standard of review." (505 F. 2d at 886-87) (footnote omitted) (emphasis added).

In the present case the Seventh Circuit explicitly considered and rejected application of a strict scrutiny approach. See 503 F. 2d at 922-24, reproduced in Appendix A to the Petition for Certiorari, pp. A19-23, and discussed at pages 10-13 of the Petition for Certiorari.

There is, of course, no viable basis for distinguishing *Reese* from the present case. The fact that *Reese* did not involve racial discrimination makes it a *less* compelling case than the present case for applying the strict scrutiny test. The principle that prohibits discrimination against urban voters in *Reese*, unlike the prohibition against racial

discrimination that applies to this case, does not rest directly upon a constitutional mandate. The present case is stronger than *Reese* since it rests upon the explicit directives of the 14th and 15th Amendments.

Nor can *Reese* be distinguished by urging that petitioners in the present case have not established a prima facie case of discrimination. As is pointed out in our Petition for Certiorari, pp. 7-10, both the district court and the Seventh Circuit found in this case that ward boundaries had been drawn so as to purposefully exclude Blacks and Puerto Ricans from particular wards. If that does not establish a prima facie case it is hard to imagine what would.

In short the *en banc* decision of the Fifth Circuit in *Reese* is directly in conflict with the decision of the Seventh Circuit in the present case. That conflict is an additional reason for granting certiorari. Supreme Court Rule 19(1)(b).

CONCLUSION

The reasons originally set forth in our Petition for Certiorari warrant granting review in this case. The respondents' discussion of the case in their brief in opposition, while highly distorted and erroneous in many respects[1], does not effectively dispute the basic conclusion asserted in the Petition: that this case presents a constitutional issue of general importance that is not resolved by

[1] One of respondents' statements is so clearly wrong that we feel compelled to correct it. Contrary to their unsupported assertions (Brief in Opposition, pp. 26-28), petitioners have never urged, and do not now urge, any theory of "proportional representation" (Brief in Opposition, p. 26) or "remedial counter-discrimination" (p. 28).

existing Supreme Court authority. (See Brief in Opposition, pp. 32-33.)

The conflicting decision of the Fifth Circuit in *Reese* is additional support for the conclusion that the Seventh Circuit erred in the present case. This Court is respectfully urged to grant the Petition for Certiorari and clarify the law in this important area.

Respectfully submitted,

MICHAEL L. SHAKMAN
R. DICKEY HAMILTON
208 South LaSalle Street
Chicago, Illinois 60604

ARAM A. HARTUNIAN
ROBERT PLOTKIN
33 North Dearborn Street
Chicago, Illinois 60602

ROBERT L. TUCKER
11 South LaSalle Street
Chicago, Illinois 60603

HOWARD C. EGLIT
6 South Clark Street
Chicago, Illinois 60603
Attorneys for Petitioners

March 12, 1975

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[1] (Continued)

We do, however, agree with respondents' admission that the persons "petitioners profess to be concerned about were simply transferred from one municipal legislative district to another." (p. 26)

We would note that since such "transferring" was done because the persons were Black or Puerto Rican the 14th and 15th Amendments were violated.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-887

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CITY COUNCIL OF THE CITY OF CHICAGO, RICHARD J. DALEY, individually and as Mayor of the City of Chicago, and BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO,

Respondents.

SUPPLEMENTAL BRIEF OF CITY COUNCIL OF CITY OF CHICAGO AND RICHARD J. DALEY, MAYOR, FILED PURSUANT TO SUPREME COURT RULE 24(5)

This supplemental brief is being filed, pursuant to Rule 24(5) of the Rules of this Court, in response to the supplemental brief of the petitioners, received by respondents on March 12, 1975. In that brief they urge that certiorari should

be granted herein for the additional reason that a conflict has arisen between the Fifth and Seventh Circuits as a result of the recent decision of the Fifth Circuit in *Reese* v. *Dallas County, Alabama,* 505 F. 2d (adv. sh.) 879 (Dec. 30, 1974).

Examination of the Fifth Circuit's opinion, we submit, demonstrates that any conflict between it and the Seventh Circuit's opinion here is merely academic.

The *Reese* case had to do with a challenge to the constitutionality of the districting plan for the election of county commissioners of Dallas County, Alabama. This was an at-large system. But the county was divided into four districts, and under the plan only one commissioner could be elected from each district. Three of the districts were rural, with populations of C209, 14,203 and 7505, respectively. The fourth district, containing the city of Selma, was considered urban and had a population of 27,379. The population of the urban district was thus roughly equal to that of the three rural districts combined. As a result of this arrangement, only one of the four county commissioners was a resident of the Selma district, although it had half the population of the county.

The Fifth Circuit found that the citizens of the urban district were *injured* in being forbidden to elect resident commissioners in proportion to the population of that district and that this constituted a violation of the one-person, one-vote principle.

It is to be particularly noted that, unlike the petitioners in the case at bar, the plaintiffs in *Reese* put in a prima facie case, a strong prima facie case, which included evidence, irrefutable evidence, of injury to the citizens of the urban district. The majority opinion clearly states (at 886):

> "Plaintiffs have established *a strong prima facie case* of official discrimination intended to dilute their voting strength." (Emphasis supplied.)

And in making that assessment of the plaintiffs' case, the Fifth Circuit ruled (at 884):

> "Finding an adverse effect on an identifiable group of voters is not sufficient in itself to establish dilution. The effect must be invidiously discriminatory. See *Reynolds* v. *Sims*, 377 U.S. at 561."

Concerning such a prima facie case, the Fifth Circuit expressly remarked (at 887):

> "Intentional dilution of a group's voting strength is a serious affront to the Constitution. Establishing this injury in court, however, is often very difficult."

It was only after the court had found that the plaintiffs had established a prima facie case, that it took up (at 886) the question of "[t]he standard of review by which justifications of the plan are to be judged . . ."

The Fifth Circuit then (at 886, 887) invoked the authority of *Dunn* v. *Blumstein*, 405 U.S. 330, at 335 (1972), to the effect that statutes burdening the right to vote "must meet close judicial scrutiny" and be "necessary to promote a compelling state interest." As we have already noted (Brief in Opposition, pp. 34, 35) the *Dunn* case was one in which this Court invalidated a Tennessee election statute requiring residence in the state of at least one year as a precondition of voting. There the plaintiff was deprived of the right to vote; he could not vote at all, and it was in the context of that clear deprivation of constitutional rights that this Court ruled (at 342, 343) that the statute could be justified only if the State could demonstrate that the enactment was "necessary to promote a compelling governmental interest."

In *Reese* the only justification for the county election plan that the county could urge on its behalf was that it operated to preserve "rural-urban balance" in the legislative body and thus protected "legitimate minority interests." This was no justification at all, as the Fifth Circuit declared (at 888), since adjudication had "long ago established that preservation of rural-urban balance in a legislative body is a categorically unacceptable reason for departing from the one man-one vote standard," citing *Davis* v. *Mann*, 377 U.S. 678, at 692 (1964).

Thus, the Fifth Circuit's endorsement of the "strict scrutiny" test in *Reese* was academic. The Dallas County, Alabama, election plan was unconstitutional under any test.

In addition to being academic, the *Reese* ruling, which was no more than a majority opinion of 8 out of 15 judges sitting on the case *en banc*, is also in conflict with this Court's treatment of the burden of proof issue in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), in which it said (at 143):

> "But we have insisted that the challengers carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements."

It was on the authority of *Whitcomb* and of *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967), and *White* v. *Regester*, 412 U.S. 755 (1973), that the Seventh Circuit in the case at bar concluded (Petition, p. A20):

> "We think that if the cases reveal an unwillingness of the Supreme Court to shift the 'burden of justification' (as urged by plaintiffs here) in causes involving the somewhat 'suspect' multimember districts, such an

> allocation would be even less likely in the context of a challenge to single-member districts."

This was the Seventh Circuit's answer to the petitioners' attempt to make the City prove their case for them, "to shift to the defendants the burden of establishing the absence of discrimination." (Petition, p. A19.)

The alleged conflict between the Circuits claimed in the petitioners' supplemental brief is non-existent. In *Reese* the plaintiffs put in a strong prima facie case and the county had no valid justification whatsoever for its election scheme; therefore there was no occasion to determine if the burden of proof shifted or what standard of justification of the enactment should be applied. In the instant case the petitioners failed to make out a prima facie case, and therefore there was also no occasion to determine whether the "strict scrutiny" test was applicable.

A careful examination of the respective opinions of the Fifth and Seventh Circuits in these two cases demonstrates the perspicacity of Mr. Justice Marshall's observation in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, at 98, 99 (1973):

> "A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis on which the classification is drawn."

As we have already stated in our brief in opposition, the petitioners' conception of the "strict scrutiny" test is un-

duly simplistic and mechanical. It also fails to recognize the necessity of putting in a prima facie case of invidious discrimination, including proof of damage, that is, purposeful exclusion from voting rights and political participation. The petitioners' position is not justified by any authority.

CONCLUSION

The petition for a writ of certiorari should be denied, or, in the alternative, the writ should be granted and the judgment of the court of appeals summarily affirmed.

Respectfully submitted,

WILLIAM R. QUINLAN
Acting Corporation Counsel
of the City of Chicago
511 City Hall, Chicago, Illinois 60602

Attorney for Respondents, City Council of the City of Chicago and Richard J. Daley, Mayor

DANIEL PASCALE
EDMUND HATFIELD
Assistant Corporation Counsel
Of Counsel